Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DETROIT NEWSPAPER AGENCY,
Petitioner,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 8(d) of the National Labor Relations Act and *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190 (1991), prohibit a court from ordering an employer to arbitrate the termination of a striking employee after the expiration of the collective bargaining agreement containing the obligation to arbitrate based on a job guarantee that had been expressly interrupted during the strike?

PARTIES TO THE PROCEEDING (RULE 14.1(b))

The caption of the case includes all parties to the proceeding in the district court and the court of appeals whose judgment is sought to be reviewed. The district court case also included a separately numbered companion case between the Graphic Communications International Union, Local 13-N and the Detroit Newspaper Agency. That case was not appealed to the court of appeals is not part of this appeal.

STATEMENT PURSUANT TO RULE 29.6

The Detroit Newspaper Agency (DNA) is a partnership between The Detroit News, Inc. and the Detroit Free Press, Incorporated. The Detroit News, Inc. is a wholly-owned subsidiary of Gannett Co., Inc. The Detroit Free Press, Incorporated is a wholly-owned subsidiary of Knight Ridder Newspapers, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Detroit Newspaper Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) was entered on March 14, 2002 and is published at 283 F.3d 779, and 169 L.R.R.M. (BNA) 2718. The March 3, 1998 opinion (App. *infra*, 18a-30a) of the district court is reported at 157 L.R.R.M. (BNA) 2742. The February 4, 1999 opinion of the district court (App., *infra*, 31a -47a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 14, 2002 (App., *infra*, 1a-17a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), is relevant to this petition and has been reproduced in the Appendix, *infra*, 78a-88a.

STATEMENT OF THE CASE

1. Overview of the Case:

In this action, the Detroit Typographical Union, Local 18 (DTU) sued to compel the Detroit Newspaper Agency (DNA) to arbitrate the discharges of certain striking employees pursuant to an arbitration clause contained in the parties' expired collective bargaining agreement. These discharged strikers were listed on the job guarantee rosters of memorandums of agreement between the DTU and the DNA. (App. *infra*, 134a-150a)

The applicable language of the memorandum of agreement is as follows:

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) *Strike or lockout.*
>
> (2) Disability of the guarantee holder.
>
> (3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.
>
> (4) Leave of absence of the priority holder.
>
> (5) Time off for union business.
>
> (6) Service in the armed forces.

(App. *infra*, 138a; emphasis added)

The memorandum of agreement also states that the job guarantees can be terminated for various reasons:

(1) Resignation of the guarantee holder.

(2) Death of the guarantee holder.

(3) Just *cause separation of the guarantee holder, unless restored to his position through the appeal* provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication.

(App. *infra*, 138a-139a; emphasis added)

It is undisputed that these limited job guarantees were "interrupted" during the strike and that the discharges took place during the strike and were based on events that occurred during the strike. The DTU sought to enforce the job guarantees through the grievance and arbitration provisions of the collective bargaining agreement between the DTU and the DNA. (App. *infra*, 89a-133a) This collective bargaining agreement had expired prior to the strike and no successor agreement had been entered into either at the time that the discharges occurred or at the time that the DTU sought arbitration.

In the district court, the DTU sought an order compelling arbitration of the issue of whether the strikers' discharges were for just cause. The DNA responded by contending that the strikers' grievances were not arbitrable because their job guarantees had been interrupted during the strike and because the collective bargaining agreement providing for arbitration had expired. The district court refused to rule on the issue of whether the strikers' interrupted job guarantees provided them with a right to arbitrate their discharges. Instead, the district court held that this issue required consideration of the merits of the dispute and that the arbitrator must decide the

issue by interpreting the parties' agreement. (App. *infra*, 27a-28a; 37a-39a) An arbitrator subsequently held that the discharge of striker Gary Rusnell was arbitrable. The arbitrator also held that the DNA did not have just cause to discharge Rusnell for blocking ingress and egress to the DNA building. (App. *infra*, 151a-168a)

The DNA then filed an action in the district court seeking an order vacating the award. The district court refused to set aside the award, applying the limited standard of review applicable to arbitration awards. (App. *infra*, 67a-89a)

Both the initial district court action by the DTU to compel arbitration and the subsequent action brought by the DNA to set aside the award were appealed to the Court of Appeals for the Sixth Circuit.[1] The Sixth Circuit combined the two cases and issued an order affirming the holdings of the district court in both cases. (App. *infra*, 1a-17a)

2. The Strike:

The material facts in this petition are undisputed. This case arises out of a labor dispute involving the DNA, the Detroit News, Inc., the Detroit Free Press, Incorporated and six unions, including the DTU. On April 30, 1995, the collective bargaining agreements between these three employers and six unions expired, including the contract between the DNA and the DTU. (App., *infra*, 89a) On July 13, 1995, the DTU and the five other unions went on strike against all three employers. The strike lasted until February of 1997, when the DTU and the other unions made unconditional offers to return to work.

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[1] The discharges of all of the other striking limited job guarantee holders were resolved by the time the appeal was filed, leaving only the Rusnell discharge at issue in the appeal.

3. Discharged Strikers are not Recalled:

During the strike, the DNA permanently replaced the striking employees.[2] Upon receiving the unions' unconditional offers to return to work, the DNA began recalling strikers based on preferential hiring lists. Some DTU members were immediately recalled because they possessed limited job guarantees under the provisions of memorandums of agreement. (App. *infra*, 134a-150a)[3] Some strikers, however, had been discharged by the DNA during the strike for strike-related misconduct. Included among these discharged strikers were a few individuals who were listed on the job guarantee rosters. Discharged strikers were not recalled to work and were not placed on preferential hiring lists after the DTU made its unconditional offer to return to work. Gary Rusnell was one of these individuals, and he was listed on a job guarantee roster.

4. The DTU Requests Arbitration:

After the DTU's unconditional offer to return to work in February of 1997, the DTU filed grievances and requested arbitration over the issue of whether the terminated individuals listed on the job guarantee rosters were discharged for just cause. The DNA refused to arbitrate the grievances because the collective bargaining agreement providing the right to arbitration had expired and because the strikers' job guarantees were interrupted at the time they

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[2] Denying enforcement of an N.L.R.B. order, the D.C. Circuit held that the strike was an economic strike and that the DNA did not violate the National Labor Relations Act by permanently replacing the strikers. *Detroit Typographical Union No. 18 v. N.L.R.B.*, 216 F.3d 109 (D.C. Cir. 2000).

[3] The agreements were originally entered into by the DTU and the Detroit News, Inc. and Detroit Free Press, Incorporated. (App. *infra*, 134a) The job guarantee provisions were adopted by the DNA after it assumed the publishing and distribution functions of the Detroit News and the Detroit Free Press under the terms of a Joint Operating Agreement.

were discharged. The DTU maintained, however, that terminated holders of limited job guarantees had a right to arbitration under the terms of the expired collective bargaining agreement.

5. The District Court Compels Arbitration:

The DTU filed a Complaint in the United States District Court for the Eastern District of Michigan on September 5, 1997. The DTU's primary claim sought an order requiring the DNA to arbitrate the grievances of the discharged individuals.[4] Alternatively, the DTU sought to litigate the strikers' claims that they were discharged without cause in district court. Because the material facts of this case were not at issue, *both* the DTU and the DNA filed motions for summary judgment in the district court on the issues of whether arbitration was available to the discharged limited job guarantee holders and whether they had a right to just cause employment during the strike.

On March 3, 1998, the district court granted summary judgment in favor of the DTU and ordered the parties to submit the issue of whether the grievances were arbitrable to the arbitrator. (App. *infra*, 18a-30a) In doing so, the district court refused to rule on the issue of whether the interrupted

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[4] The Graphic Communications International Union, Local 13-N ("'GCIU'"), which is one of the other unions that went on strike against the DNA, also filed a Complaint against the DNA containing allegations that were substantially similar to the DTU's allegations. The DTU case, Eastern District of Michigan Case No. 97-CV-74551 and the GCIU case, Eastern District of Michigan Case No. 97-CV-74553 were consolidated before Judge Julian Abele Cook Jr. because they contained common issues of fact and law. The DNA and the GCIU resolved Case No. 97-CV-74553 during the course of litigation before the district court. The GCIU was a party to the district court's March 3, 1998 order, but not its later February 8, 1999 order concerning arbitrability. The GCIU was also not a party to the appeal to the Sixth Circuit Court of Appeals and is therefore not a party in this Petition.

job guarantees constituted vested rights under the Supreme Court's decision in *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190 (1991), so as to provide for enforcement under the arbitration provision of the expired collective bargaining agreement. Instead, the district court held that it was prevented from reaching the issues of whether the strikers possessed job guarantees during the strike and whether their discharges were arbitrable during the strike because that issue required consideration of the merits of the dispute. The district court therefore ordered the parties to arbitrate this arbitrability issue. (App. *infra*, 27a-28a) [5]

6. The District Court Clarifies Its Order Compelling Arbitration:

On September 18, 1998, the first arbitration between the DTU and the DNA concerning a discharge of a striker named John Martin was scheduled for a hearing before an arbitrator.[6] At the hearing, the DNA raised numerous defenses to the arbitrability of Martin's grievance, including the issue of whether the interrupted job guarantee gave rise to a right to arbitration under the arbitration clause of the expired collective bargaining agreement. The DTU objected and refused to proceed with the arbitration, claiming that the

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[5] Because the DTU had also asserted an alternative claim for breach of the job guarantee agreements in the event that it received an adverse ruling on the arbitrability issue, the district court stayed the proceedings pending a resolution of the arbitrability issue in arbitration. (App. *infra*, 28a) This order was not a final order and was not immediately appealable. The DNA therefore proceeded with arbitration and appealed the district court's rulings after a final order and separate judgment were issued by the district court on April 27, 2000. (App. *infra*, 48a-50a)

[6] Like Gary Rusnell, John Martin was a striker with an interrupted job guarantee who was discharged during the strike. His arbitration was scheduled prior to Gary Rusnell's arbitration. John Martin's grievance was ultimately settled by the parties because he decided to retire.

DNA was prohibited from objecting to the arbitrability of the grievances pursuant to district court's March 3, 1998 Order.

The DTU filed a Motion for Contempt on October 13, 1998, claiming that the DNA improperly objected to arbitrability at the arbitration. The basis for the DTU's motion for contempt was its argument that the district court's March 3, 1998 Order could not have required the parties to arbitrate the issue of whether its members possessed job guarantees during the strike. The DTU contended that such a ruling would have been contrary to *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643 (1986), which requires a court, not an arbitrator, to decide issues of substantive arbitrability. The DTU's motion was referred to a Magistrate Judge.

The Magistrate Judge issued a report and recommended order on November 18, 1998 that denied the DTU's motion for contempt and held that the district court had indeed ruled that issues of arbitrability must be decided by the arbitrator. The DTU objected to the Magistrate's report and recommended order.

On February 8, 1999, the district court issued an order denying the DTU's motion for contempt and clarifying its ruling on the issue of arbitrability. The district court clarified that its March 3, 1998 Order only held that the "subject matter" of the limited job guarantees was arbitrable and that the issue of whether the particular grievances asserted by the discharged employees were subject to arbitration was for the arbitrator to decide. (App. *infra*, 35a-39a) Subsequently, all of the DTU's outstanding grievances that were the subject of this litigation were settled by the parties without arbitration except for the grievance concerning Gary Rusnell's discharge.[7]

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[7] Like John Martin, these discharged strikers decided to retire in lieu of pursuing their respective grievances.

7. The District Court Enforces the Arbitrator's Award:

On December 16, 1999, Arbitrator Robert McCormick issued an award finding that Rusnell's grievance was arbitrable and finding that the DNA did not have just cause to terminate Rusnell. The DNA then filed a new lawsuit, Eastern District of Michigan Case No. 00-70580, seeking to set aside the Rusnell arbitration award. The district court, applying the limited standards for reviewing arbitration awards set forth in under *United Paperworkers v. Misco*, 484 U.S. 29 (1987), refused to set aside the arbitrator's award and dismissed the case.

8. Appeal To The Sixth Circuit:

Both the initial district court case brought by the DTU seeking to compel arbitration and the case brought by the DNA seeking to overturn the arbitration award were appealed to the Sixth Circuit Court of Appeals. The cases were consolidated for oral argument and decision. On March 14, 2002, the Sixth Circuit issued a published opinion affirming the district court's decisions in both cases. Specifically, the Sixth Circuit affirmed the district court's ruling that a court fulfills its obligation to determine the substantive arbitrability of a grievance by ruling generally that the dispute was "covered" by the arbitration agreement and leaving the issue of whether the particular grievance at issue is subject to arbitration for the arbitrator to decide. The Sixth Circuit also held that the job guarantees constituted vested rights under the Supreme Court's holding in *Litton Financial Printing Div. v. N.L.R.B., supra,* despite fact that the job guarantees were interrupted during the strike. The Sixth Circuit also held that the striking workers had a right to arbitrate whether their terminations were for just cause.

REASONS FOR GRANTING CERTIORARI

This case is of great significance because it involves the interplay between several competing labor law doctrines that converge in the oft-repeated scenario of a court being asked to determine if a grievance is arbitrable under the arbitration clause of an expired collective bargaining agreement. Although the Court has issued previous opinions regarding the role courts should play in determining whether a post-expiration grievance is arbitrable, there remains considerable confusion and conflict among the lower courts about the extent to which the courts can consider the merits of a dispute in ruling on arbitrability. There is also confusion about the effect other important federal labor law doctrines have on this determination.

This case magnifies the confusion and conflict among the lower courts because it requires the application of two federal labor law doctrines that are often at odds with one another. On the one hand, Supreme Court precedent holds that courts must determine the substantive arbitrability of a grievance by interpreting the collective bargaining agreement to the extent necessary to establish whether the parties agreed to arbitrate the dispute. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, (1960); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Litton, supra.* On the other hand, Supreme Court precedent holds that courts should not rule on the merits of a dispute in exercising their duty to interpret the agreement in order to determine substantive arbitrability. *AT&T Technologies, supra.* The tension between these two doctrines is particularly evident when courts are called upon to determine arbitrability in the context of an expired collective bargaining agreement. This occurs because the question of arbitrability typically hinges, as it does in this case, on a determination of whether an action taken after the expiration of a collective bargaining agreement infringes a right that accrued or vested under the agreement.

The determination of whether a right is accrued or vested sometimes appears to reach the merits of the dispute, when in reality, a court must address the issue in order to determine substantive arbitrability.

This case also addresses the interplay between the Court's decisions in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1967), and *Litton, supra*. Both cases address the scope of the two arbitrability doctrines in the context of expired collective bargaining agreements. The Sixth Circuit's decision in this case creates a conflict between the circuits regarding the proper application of these cases.

This case also involves the Sixth Circuit's misapplication of *Litton* in direct conflict with two other important and long-established labor law doctrines. The first doctrine is the statutory prohibition in Section 8(d) of the National Labor Relations Act (NLRA) against courts requiring an employer and a union to agree to any particular obligation in negotiations, including a right to just cause employment or to arbitration. *See H.K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970). The second doctrine is Supreme Court precedent recognizing that the *quid pro quo* of an agreement to arbitrate is an agreement not to strike. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit's affirmance of the district court's decision to refer to the arbitrator the issue of substantive arbitrability conflicts with *Litton, supra*. The affirmance also creates a split among the circuits over the extent to which a court is required to interpret a collective bargaining agreement in fulfilling its duty to determine if a grievance is substantively arbitrable.

In order to decide the issue of substantive arbitrability, the district court should have interpreted the contract to determine whether Gary Rusnell's discharge, which occurred during a strike and after the expiration of the collective bargaining agreement, was arbitrable based on the existence of a job guarantee that was, by its own terms, interrupted during the strike. *Litton, supra.* The district court refused to decide this issue, ultimately with the blessing of the Sixth Circuit, relying on *AT&T Technologies, supra,* for the proposition that courts should not decide the merits of the dispute in determining arbitrability. (App. *infra,* 27a-28a) The district court instead held that its obligation to determine substantive arbitrability was satisfied because the subject matter of "job guarantees" was generally "covered" by the arbitration agreement in the expired collective bargaining agreement. (App. *infra,* 25a-28a; 35a-39a) In affirming the district court, the Sixth Circuit opined that this holding fulfilled the district court's obligations under *AT&T Technologies,* even though the district court left for the arbitrator the issue of whether a discharged striker who had an interrupted job guarantee had a vested right under the expired agreement to arbitrate whether he was terminated for just cause. (App. *infra,* 10a) Yet that issue is quintessentially an issue of substantive arbitrability that should have been decided by the district court. *Litton, supra.*

The district court and the Sixth Circuit reached this conclusion by misapplying the holding in *AT&T Technologies.* In *AT&T Technologies,* the lower courts compelled arbitration of a layoff dispute without deciding the issue of arbitrability because the district court concluded that the union's interpretation of the collective bargaining agreement was at least "arguable" and that the court could not determine arbitrability without interpreting substantive provisions of the agreement. The Court reversed these decisions because ". . . the question of arbitrability—whether a collective-bargaining agreement creates a duty for the

parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Technologies*, 475 U.S. at 649. The Court also stated: "It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs. . . ." *AT&T Technologies*, 475 U.S. at 651. Thus, contrary to the Sixth Circuit's holding in this case, the district court did not satisfy its obligations to interpret the agreement and determine arbitrability under *AT&T Technologies* when it referred to arbitration the issue of whether Gary Rusnell's job guarantee provided him with a vested right to arbitrate his discharge during the strike.

The lower courts' rulings are also contrary to *Litton*, *supra*. In *Litton*, the union requested arbitration on the issue of whether the employer had improperly laid off employees after the expiration of the collective bargaining agreement without regard to seniority order. Similar to the district court's ruling in this case, the union in *Litton* argued that the issue of whether the seniority rights provision survived expiration of the agreement was, in fact, the merits of the dispute and that the Court's resolution of this issue would be improper. The Supreme Court disagreed, stating that even though there is a general presumption in favor of arbitrability:

> . . . we must determine whether the parties agreed to arbitrate this dispute, and **we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.**

Litton, 501 U.S. at 209 (Emphasis added); *See also First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 942-943 (1995) (a party cannot be forced to arbitrate the issue of arbitrability absent an explicit agreement to arbitrate arbitrability).

The Court also clarified its prior ruling in *Nolde*, *supra*. *Nolde* held that the parties' obligation to arbitrate survives the expiration of a collective bargaining agreement when the

obligation is arguably created by the expired agreement. *Nolde*, 430 U.S. at 252, *citing John Wiley & Sons, supra.*[8] In *Litton*, the Court held that *Nolde* did not announce a rule that post-expiration grievances concerning terms and conditions of employment always remain arbitrable. Instead, the Court held that arbitration is only available when a post-expiration grievance concerns vested rights under a collective bargaining agreement and announced a test for determining whether the grievant possessed a vested right:

> A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Litton, 501 U.S. at 205-206. The Court also held that the court is required to interpret the parties' agreement to the extent necessary to determine whether the grievance is based on a vested rights. *Id.*

Accordingly, in *Litton*, the Court interpreted the seniority provision of the parties' expired collective bargaining

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[8] In *John Wiley & Sons*, the Court held that substantive arbitrability issues, such as whether a party agreed to arbitrate a dispute concerning an alleged right under the collective bargaining agreement, are for judicial determination. The Court also held that procedural arbitrability issues, such as whether a particular grievance procedure step is applicable or whether a time limit precludes arbitration, are best left for the arbitrator. *John Wiley & Sons*, 376 U.S. at 554-58. As indicated, this case involves an issue of substantive arbitrability, which is whether interrupted job guarantees provided strikers with the right to arbitrate whether their discharges were for just cause. The district court improperly applied *John Wiley* when it characterized its decision as a determination that the subject matter of the job guarantees was arbitrable, because it refused to address the issue of whether the DNA agreed to arbitrate the grievances of the strikers with interrupted job guarantees.

agreement in order to determine the arbitrability issue of whether or not the employees had a vested right to a particular order of layoff. Because the Court found that no vested right concerning the order of lay off existed under the contract, it ruled that the employer was not obligated to arbitrate the merits of the dispute. The district court should have conducted the same analysis in this case regarding the interrupted job guarantee but refused to do so, and the Sixth Circuit affirmed that decision.

The holding in *Litton* seemed to clearly provide that the rule that courts should avoid addressing the merits of the dispute in determining substantive arbitrability must be subordinate to the rule that courts have an obligation to interpret the agreement to the extent necessary to determine substantive arbitrability even if this interpretation might implicate the merits of the dispute. Nonetheless, the lower courts continue to profess confusion about the scope of a party's right to a judicial determination of substantive arbitrability because *Litton* expressly disavows that it overruled *Nolde*. *Litton*, 501 U.S. at 205-206.

For example, in *Luden's Inc. v. Local Union No. 6, Bakery, Confectionary and Tobacco Workers*, 28 F.3d 347 (3d Cir. 1994), the Third Circuit had the opportunity to examine the interplay between the two competing arbitrability principles at issue in this case. The Third Circuit observed that other circuits faced with the issue have held that *Litton* impliedly overruled the portion of *Nolde* holding that a court may not look at the merits of the claim in resolving whether the parties have agreed to arbitrate the grievance.[9] *Luden's*, 28 F.3d at

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[9] The Third Circuit believed that The Fourth Circuit in *Cumberland Typographical Union No. 244 v. The Times Alleganian Co.*, 943 F.2d 401 (4th Cir. 1991), and the Sixth Circuit in *International Brotherhood of Teamsters, Local Union 1199 v. Pepsi Cola General Bottlers, Inc.*, 958 F.2d 1331 (6th Cir. 1992), and *Cincinnati Typographical Union No. 3, Local 14519 v. Gannett Satellite Information Network, Inc.*, 17 F.3d 906

354. The Third Circuit, "being reluctant to follow their course," avoided the issue completely by holding:

> Because we conclude that Luden's contractual duty to arbitrate grievances never lapsed completely, this avenue provides the route whereby we may avoid addressing the uncertain interplay between *Nolde* and *Litton* **though we express hope that the Supreme Court will take on that challenge itself.**

Luden's, 28 F.3d at 354. (Emphasis added)

The Seventh Circuit directly resolved the uncertain interplay between the two competing arbitrability rules by finding that the rule that courts must resolve the arbitrability of a grievance takes precedence over the rule that courts should avoid addressing the merits of a grievance. In *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993), the district court made essentially the same decision that the district court in this case made, which was to send the case to arbitration without determining whether the grievance at issue was arbitrable. The arbitrability issue in *Hyster* was very similar to the arbitrability issue in this case. The parties' collective bargaining agreement provided for medical insurance for unit employees. The company implemented changes to the medical insurance benefits for retired employees. Upon learning of the changes in retiree insurance, the union filed a grievance and demanded arbitration. The company responded that arbitration was not available to *retired* employees under the terms of the collective bargaining agreement. The district court referred this arbitrability issue to the arbitrator because it believed that deciding whether retired employees were covered by the

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(6th Cir. 1994), had issued opinions relevant to this issue. *Luden's*, 28 F.3d at 354, n. 10. However, a close reading of these opinions show that they do not address the interplay between *Nolde* and *Litton* or the tension between the rules that courts should not interpret the merits of the dispute and the rule that courts must determine substantive arbitrability.

arbitration provision of the collective bargaining agreement would require it to interpret the contract and rule on the merits of the dispute. *Independent Lift Truck Builders Union v. Hyster Co.*, 803 F. Supp. 1367, 1371 (C.D. Ill. 1992).

On appeal, the Seventh Circuit, relying on *Litton*, reversed the district court's holding:

> . . . the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it . . . .

Hyster, 2 F.3d at 236-237; *See also Local 744, International Brotherhood of Teamsters v. Hinkley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996).

The Sixth Circuit's holding in this case has therefore created a split among the circuits because it is directly contrary to the Seventh Circuit's ruling in *Hyster*. The Sixth Circuit's holding requires a court to send the issue of arbitrability to the arbitrator if the Court's interpretation of the contract could impact the merits of the grievance. Other circuits addressing this issue post-*Litton* have not directly resolved this conflict but have in principle followed the Seventh Circuit's approach in *Hyster*. *See Oil, Chemical, & Atomic Workers v. Conoco, Inc.*, 241 F.3d 1299, 1304-1305 (10th Cir. 2001); *Bell Atlantic-Pennsylvania, Inc. v. Communications Workers of Am., Local 1300*, 164 F.3d 197, 201 (3d Cir. 1999); *Kansas City S. Transport Co. v. Teamsters Local #41*, 126 F.3d 1059, 1067 (8th Cir. 1997). *See also Local Union No. 637, International Brotherhood of Electrical Workers v. Davis H. Elliot Co.*, 13 F.3d 129, 132-133 (4th Cir. 1993) (court's duty to determine arbitrability is limited to determining whether the subject matter of the grievance is arbitrable—but a court must decide whether the parties intended to arbitrate the grievance issues).

The rulings below also reveal a fundamental misunderstanding of what constituted the "merits" of the dispute between the DTU and the DNA. The "merits" of Gary Rusnell's grievance related to whether he was discharged for just cause, thereby terminating his job guarantee, *not whether arbitration was a vested right available during a strike to a discharged employee who had an interrupted job guarantee.* This latter issue was clearly an issue of substantive arbitrability that should have been decided by the district court and would not have required a determination of whether the striking employees were properly discharged. *Litton, supra.*

The critical flaw in the reasoning of both the district court and the Sixth Circuit can perhaps best be illustrated by the fact that their rulings create the potential for inconsistent conclusions about arbitrability by the courts and the arbitrator. The district court ruled that the dispute was *arbitrable* because it could not say "with positive assurance" that grievances over the general subject matter of job guarantees were not "covered" by the arbitration clause of the expired agreement. At the same time, however, the district court allowed the arbitrator to determine whether the interruption of the job guarantee during a strike meant that there was no right to arbitrate the issue of whether discharged strikers were terminated for just cause. In other words, the arbitrator was free to decide that the dispute was really *not arbitrable* because the job guarantee had been interrupted,[10] even though the district court had previously held that the dispute was *arbitrable.* Clearly, granting such license to the arbitrator violates the long standing principle in *John Wiley* that substantive arbitrability is for the district court to decide.

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[10] As the Sixth Circuit noted, the arbitrator clearly determined the issue of arbitrability: "'Arbitrator Robert A. McCormick ruled that the grievance was arbitrable.'" (App. *infra*, 10a-11a)

II. THE DECISION BELOW EXPANDS THE *LITTON* TEST IN CONFLICT WITH SECTION 8(d) OF THE NLRA AND SUPREME COURT PRECEDENT PROVIDING THAT ARBITRATION IS A QUID PRO QUO FOR AN AGREEMENT NOT TO STRIKE

The *Litton* test for determining whether a post-expiration grievance is arbitrable permits a court to interpret a contract to the extent necessary to determine arbitrability, but it does not go so far as to permit a court to rewrite the agreement of the parties. In this case, the Sixth Circuit attempted to justify the district court's refusal to consider the issue of arbitrability by stating that it agrees with the union's interpretation of the limited job guarantee because "it is actually the only fair reading of the guarantee." (App. *infra*, 10a-11a) The Sixth Circuit stated that it believed that the "interruption" of the job guarantee only provided "a respite for the employer from paying wages and providing benefits" to job guarantee holders during the strike. (App. *infra*, 11a)

The *Litton* test only allows a court to interpret a contract to determine whether the grievance at issue involves a vested right under "normal principles of contract interpretation." *Litton*, 501 U.S. at 205-206. Normal principles of contract interpretation do not allow the court or the arbitrator interpreting the contract to ignore the plain language of the agreement in determining whether a vested right exists. Even under the limited standards for reviewing arbitration awards, arbitrators (and courts) are prohibited from ignoring the plain language of an agreement. *United Paperworkers v. Misco, supra*. As such, the Sixth Circuit should have confined its inquiry to the question of whether an interrupted job guarantee created a vested right to just cause employment and to arbitration under an expired collective bargaining agreement during the period of the interruption. The Sixth

Circuit, however, went beyond this *Litton* mandate by redefining what the interruption of a job guarantee means based on its own "fair reading" of the agreement.[11]

The Sixth Circuit went beyond a determination of the "vesting" issue and held that the DNA's interpretation of the interruption of the limited job guarantee was "unreasonable" because it would allow the DNA to terminate employees without recourse not only when they were on strike, but also when they were on disability leave, in the armed services, absent on union business or when the operation of the newspaper was suspended due to an Act of God. The Sixth Circuit did not think that the scope of such a provision was "fair" so the court completely ignored the meaning of the term "interruption" and essentially wrote this language out of the agreement.

The "interruption" of the job guarantee does no more than place employees with limited job guarantees on the same footing as other employees when one of the listed events (strike, disability leave, military leave, etc.) occurs. It does not give the DNA the unfettered right to terminate a job guarantee employee without recourse during the interruption of the job guarantee *unless that right existed with respect to other employees who were not subject to the job guarantee.*

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[11] The two cases cited by the Sixth Circuit in support of its decision illustrate that the Sixth Circuit failed to rule on the fundamental issue in this case, which is whether an interrupted right is "'vested"' during the period of the interruption. In *Cumberland Typographical Union No. 244 v. The Times Alleganian Co.*, 943 F.2d 401, 403, n.1 (4th Cir. 1991), the parties agreed that the job guarantee agreement remained in effect after the expiration of the collective bargaining agreement and that the arbitration clause of the collective bargaining agreement was binding on the dispute. In *Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510, n. 8 (7th Cir. 1988), the court did not decide whether the job guarantees contained in the supplemental agreement could be enforced if the main collective bargaining agreement was no longer in effect.

For example, if an employee with an interrupted job guarantee is terminated while on disability leave but the collective bargaining agreement is in effect during the disability leave, the employee can utilize its provisions like any other employee to seek arbitration on the issue of whether his termination was without just cause. But in the case of a strike, when the collective bargaining agreement has expired, a striking employee with an interrupted job guarantee has no greater right to arbitration than any other striking employee.

Based on its own misguided notions of what is "fair," the Sixth Circuit violated Section 8(d) of the NLRA by imposing an obligation to arbitrate on the DNA where none existed. In doing so, the Sixth Circuit modified the parties' agreement by holding that the right that was interrupted was the right to payment of wages and benefits during the strike. This is clearly contrary to the plain language of the agreement, which states that the job guarantee *itself* is interrupted.[12]

The Sixth Circuit's decision was also made without any mention or consideration of the well-established doctrine that an agreement to arbitrate is the *quid pro quo* for an agreement not to strike. *Textile Workers v. Lincoln Mills,* 353 U.S. 448,

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[12] The Sixth Circuit's holding makes no sense because it suggests that without the "interruption" provision, the DNA would somehow be obligated to pay employees while they are on strike, on a medical leave, off for union business, or serving in the armed forces. Even more troubling is the Sixth Circuit's declaration that the DNA has provided no authority for the proposition that the interruption of the job guarantee "permits an employer to terminate a guarantee holder without just cause *or one of the other listed grounds for termination.*" (App. *infra*, 11a, emphasis added) Carrying this analysis to its logical conclusion, the Sixth Circuit is stating that if a job guarantee holder resigned during a period of interruption, the DNA would still have to guarantee that person a job until the period of the interruption ceased. Moreover, if an employee died during the period of interruption, the DNA would still have some sort of obligation to guarantee the deceased a job until the period of interruption ceased.

455 (1957); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960). Although the Sixth Circuit redefined the meaning of what constitutes an interrupted job guarantee based on its own notions of what is fair, the court completely ignored the fact that there is nothing unusual about the inclusion of language suspending the job guarantee's just cause termination protection during a strike. The Memorandum of Agreement was not created in a vacuum. It was a collectively bargained supplemental agreement, in which the parties recognized the possibility of strikes and the expiration of the parties' primary collective bargaining agreements during the term of the Memorandum of Agreement. The Memorandum of Agreement therefore explicitly provided, in keeping with the traditional *quid pro quo* concept, for the interruption of the job guarantees during a strike.

The Sixth Circuit's duty to apply traditional principles of contract interpretation, as set forth in *Litton*, requires the court to at least consider federal labor policy and doctrines underlying collective bargaining agreements. Indeed, if federal labor policy is to be given effect, courts cannot refuse to recognize labor law doctrines that create the underpinnings of a collectively bargained agreement. In this case, which involves a claim to arbitrate the post-expiration discharges of strikers, the court was required to at least consider the traditional *quid pro quo* in order to comply with the *Litton* test. This quintessential labor law principle simply cannot be completely ignored by the Sixth Circuit if it is to apply "normal principles of contract interpretation" in determining whether a vested right to a job guarantee existed during the strike. The DNA submits that courts applying the *Litton* test not only have the obligation to give effect to clear contract language, like the language interrupting the job guarantee during a strike, but they must consider traditional labor law doctrines that may have formed the basis of the bargain in interpreting ambiguous contract language to determine

whether a vested right exists. The Sixth Court's decision in this case has altered the *Litton* test and violates Section 8(d) by giving courts *carte blanche* make a determination as to what contract terms would be "fair" instead of applying normal principles of contract interpretation to determine what the parties agreed to in collective bargaining.

In effect, the decision of the Sixth Circuit rewrites the parties' agreement which interrupted the job guarantees during the strike. While the job guarantees were interrupted, the effected employees were merely placed in the same position as any other striker—they had no right to just cause employment and no right to arbitrate the propriety of discharges that occurred during the strike. By writing the "interruption" language out of the parties' contract, the Sixth Circuit's decision improperly uses *Litton* as a vehicle for violating Section 8(d). The Sixth Circuit's decision, which gives courts license to impose contract terms on parties under the auspicious of determining vested rights, is contrary to long standing federal labor policy and Supreme Court precedent and therefore warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-1613/2080

00-1613

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Plaintiff-Appellee,

v.

DETROIT NEWSPAPER AGENCY,
Defendant-Appellant.

00-2080

DETROIT NEWSPAPER AGENCY,
Plaintiff-Appellant,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 97-74551; 00-70580
Julian A. Cook, Jr., District Judge.

Argued: January 23, 2002

Decided and Filed: March 14, 2002

Before: KENNEDY and DAUGHTREY, *Circuit Judges*; BELL, *Chief District Judge.*[*]

OPINION

KENNEDY, Circuit Judge. The Detroit Newspaper Agency ("DNA"), which conducts joint operations for the *Detroit Free Press* and *Detroit News* newspapers, appeals two judgments of the District Court in these related cases arising in the aftermath of a strike against the newspapers by the Detroit Typographical Union, Local 18 (the "Union"). The Union sued DNA (No. 00-1613) after the strike had ended to compel arbitration of the DNA's refusal to reinstate Gary Rusnell, who had a lifetime guarantee under a collective bargaining agreement. The DNA appeals the district court's judgment compelling the DNA to arbitrate its refusal to reinstate Rusnell. Following the arbitrator's decision to reinstate Rusnell, the DNA sued the Union (No. 00-2080) to vacate the arbitrator's decision. The DNA appeals the district court's judgment denying its motion for summary judgment and granting the Union's cross-motion for summary judgment to enforce the arbitration award. Because these two cases concern common issues, we treat them in a single opinion.

We find that Rusnell's lifetime employment guarantee was a vested right that survived the expiration of the collective bargaining agreement. While suspended during the strike, this right could not be terminated by the DNA except in accordance with the provisions of the lifetime guarantee

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[*]The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

agreement, including the arbitration provision of the last collective bargaining agreement. Therefore, we affirm the district court's judgment requiring arbitration of the dispute. We reject the DNA's objections to the arbitration award and affirm the judgment enforcing the award.

I. FACTS

In 1974, the Union entered into separate but identical Memoranda of Agreement ("MOA") with the Detroit Free Press and the Detroit News. The DNA, the entity formed to assume the joint operational responsibilities of the two papers, adopted both MOAs. Each MOA contained a lifetime job guarantee for certain named Union members. Rusnell is one of those named as having a lifetime guarantee. The MOA states:

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) Strike or lockout.
>
> (2) Disability of the guarantee holder.
>
> (3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.
>
> (4) Leave of absence of the priority holder.
>
> (5) Time off for union business.
>
> (6) Service in the armed forces.
>
> This guarantee shall be terminated for the following causes:
>
> (1) Resignation of the guarantee holder.
>
> (2) Death of the guarantee holder.

(3) Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication.

The MOA also includes a section titled "MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT" which provides that the provisions of the MOA "shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties."

The DNA and the Union entered a series of collective bargaining agreements ("CBA") incorporating the MOA. The agreement to govern their relationship between 1992 and 1995 provided that an arbitrator would decide "all disputes regarding the interpretation of any portion of [the] agreement." The 1992-1995 CBA also included a specific provision on job guarantees which stated that the guarantees "will terminate on the occurrence" of "any one of the following": death, retirement, voluntary separation, or discharge for cause. The CBA further stated that the "guarantee commitment shall endure beyond the term of any specific Collective Bargaining Agreement executed between the parties."

On April 30, 1995, the CBA between the parties expired, and on July 30, the Union and other unions whose members were employed by the DNA went on strike. During the strike, in response to violence on the part of members of some of the other striking unions, the DNA filed an unfair labor practice charge against all of the striking unions, including the Typographical Union. As part of a consent order which applied to the Union, the National Labor Relations Board ("NLRB") called on the strikers to cease and desist "blocking

or otherwise coercively interfering with ingress or egress" to DNA facilities "in any manner or by any means including, but not limited to: physical confrontation or intimidation, unlawful group trespass, mass picketing, stationary picketing, or placement of barriers, or star nails or other sharp object." No. 00-2080 App. at 167. The Sixth Circuit subsequently enforced the NLRB's order.

Rusnell participated in a demonstration during the strike in which strikers sat down in front of the Detroit offices of the *Detroit News*. The DNA subsequently sent a letter to Rusnell which stated:

> You are being discharged from the Detroit Newspaper Agency because of your conduct on August 30, 1996.
>
> On that date you blocked the ingress and egress to the front entrance of The Detroit News building. Your conduct is even more egregious in that it violates a formal National Labor Relations Board Settlement Agreement prohibiting such behavior.
>
> This type of behavior will not be tolerated and is just and sufficient cause for your discharge.

In February, 1997, the Union made an unconditional offer to return to work, and the DNA began re-hiring lifetime guarantee holders other than those who had turned 65 during the course of the strike and those it had terminated for alleged strike misconduct. Rusnell was among the employees the DNA refused to reinstate.

In March 1997, the Union filed a grievance complaining about DNA's failure to re-hire Rusnell (and other employees whose cases have since settled). The DNA refused to arbitrate the issues of whether Rusnell had rights under the MOA that survived the expiration of the collective bargaining agreement, whether those rights should be arbitrated, and

whether it had "just cause" to terminate Rusnell. The Union brought suit in district court to compel arbitration. The DNA argued that arbitration was not available as to the lifetime job guarantees because the guarantees were interrupted by the strike and thus (during the course of the strike) could be terminated at DNA's discretion. The DNA also argued that in any event arbitration was not available because the collective bargaining agreement had expired before Rusnell's discharge.

On March 3, 1998, the district court granted the Union's motion for summary judgment to compel arbitration. The court recounted the standard for compelling arbitration, noting that it could not decline to order arbitration unless it could say with "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" The court found that a "strong argument" could be made that the job guarantee provisions survived the "mere expiration of any agreement." The court found unpersuasive the DNA's argument that Rusnell's termination was not subject to arbitration because the job guarantees did not apply during the strike. The court noted that the DNA's position presumed that the merits of the dispute—whether the guarantees applied during the strike—would be decided in its favor. Since the court was apparently convinced that the Union's position on whether the guarantees were in force during the strike was at least arguable, it ordered arbitration. In a later order, the court characterized its March 3 decision as determining "that the parties had contracted to submit the subject matter of the grievance to arbitration."

The case thus proceeded to arbitration. The DNA again disputed whether the DNA was required to arbitrate Rusnell's termination. Arbitrator Robert A. McCormick ruled that the grievance was arbitrable. He found that "the DNA considered itself bound by the just cause provision of the lifetime job guarantee agreement when it discharged Mr.

Rusnell," pointing to the DNA's discharge letter to Rusnell (which stated that it had just cause to terminate him) and to the fact that a DNA lawyer had answered "that's correct" when asked if just cause was the only issue in the arbitration.

Furthermore, Arbitrator McCormick found that the agreement itself did not permit the DNA to terminate guarantee holders during a strike, since such a reading would render frivolous the "termination" exceptions stated in the MOA. McCormick also found that the DNA lacked just cause for terminating Rusnell, since Rusnell by himself had not blocked anyone's ingress or egress to the building, promptly obeyed directions of Detroit police officers, and was not arrested. The arbitrator refused to consider whether Rusnell violated the Sixth Circuit and NLRB orders regarding blocking egress from the buildings, which he found were "beyond the scope of the arbitrator's authority which grows out of, and is limited to, the contract between the Parties."

The DNA subsequently filed suit in the district court to overturn the arbitrator's award. The DNA argued that it had not waived the issue of arbitrability, and that the arbitrator had improperly refused to consider the Sixth Circuit and NLRB orders in determining whether the DNA had "just cause" to terminate Rusnell. The Union counterclaimed for enforcement of the arbitration award.

The district court enforced the arbitrator's award. The court ruled that the arbitrator had "employed permissible tools of contractual interpretation" to conclude that a strike did not permit unilateral termination of a lifetime guarantee. The court read the guarantee as "a compromise position under which the [DNA] is protected from paying labor costs for guaranteed workers who strike while the strikers have the assurance that, absent just cause or other specified reason, they can return to their guarantees upon their return to work." The court found that the DNA's claim regarding the NLRB/Sixth Circuit orders was a "reasonable claim of error,"

but that it was harmless since "the Newspaper would be unable to obtain a different outcome even if the alleged error is corrected." The court held that even if the arbitrator had considered the consent order of the NLRB and the Sixth Circuit's enforcement, he would not have found that Rusnell "obstruct[ed] or interfere[d] with the Newspaper's entryway. As such, it cannot be legitimately argued that he violated the terms of the consent orders."

The DNA subsequently filed a motion for reconsideration. For the first time, the DNA asserted that the district court lacked authority to order specific performance of the arbitration award enforcing the MOA because the Norris-LaGuardia Act bars injunctions requiring parties to specifically perform an employment guarantee. The district court ruled that Norris-LaGuardia did not prohibit it from enforcing the specific performance component of the arbitrator's award. The court noted that precedent justified enforcing the reinstatement components of arbitration awards and that other courts had explicitly excepted arbitration awards from Norris-LaGuardia's bar on ordering specific performance.

II. ANALYSIS

A. ARBITRABILITY

In the first appeal (No. 00-1613), the DNA charges the district court erred by requiring the parties to arbitrate Rusnell's grievance. The DNA's basic argument before the district court, and here, is that the strike "interrupted" the lifetime guarantees, and thus that there was no requirement during the interruption that the termination be for just cause or covered by one of the other termination provisions of the MOA. As a result, DNA asserts, the Union's request to arbitrate whether there was "just cause" for the dismissal could not be granted.

On appeal, the DNA claims that the district court declined to rule definitively on arbitrability, and argues that this was an error. The DNA also reiterates its argument that the lifetime guarantees were not arbitrable because the collective bargaining agreement had expired. The Union counters that the DNA waived its right to challenge arbitrability by arguing the issue in front of the arbitrator.

We review summary judgments compelling arbitration under a *de novo* standard. *Cincinnati Typographical Union v. Gannett Satellite Information Network, Inc.*, 17 F.3d 906, 909 (6th Cir. 1994). The Union argues that our standard for overturning arbitration awards--a much stricter one--should also apply to our review of the district court's judgment compelling arbitration. The Union does not provide any analysis or precedent to support its claim, and we think that the language of *Cincinnati Typographical Union* is quite clear on this point. Therefore, we review the district court's decision on arbitrability *de novo*.

The Union argues that the DNA waived its right to appeal arbitrability by arguing the issue of arbitrability without reservation before the Arbitrator. However, the DNA argued before the district court that the dispute was not arbitrable; therefore, it has properly preserved the issue of arbitrability in its appeal from summary judgment ordering arbitration. The case relied upon by the Union, *Vic Wertz Distributing Co. v. Teamsters Local 1038*, 898 F.2d 1136 (6th Cir. 1998), expressly distinguished itself from cases in which the issue of arbitrability is contested in the district court in an action to compel arbitration. *Id.* at 1140. Nor do we find merit in the Union's argument that the DNA's failure to take an interlocutory appeal of the district court's order to arbitrate somehow indicates it waived its right to appeal the order in a timely fashion. Similarly, the Union's reliance on the arbitration record (in which the DNA apparently limited the issues before the arbitrator to substantive ones) is

inappropriate because those facts were not part of the record before the district court when it compelled arbitration. The DNA has clearly not waived its right to appeal summary judgment as to arbitrability.

Therefore, we turn to the question of the whether the district court committed reversible error when it ordered arbitration. The DNA contends that the district court erred by "refus[ing] to resolve . . . whether there was a right to arbitrate the propriety of discharges that occurred during the strike." No. 00-1613 Br. 24. Actually, the district court explicitly determined that the dispute was "covered" by the arbitration agreement and thus compelled arbitration. No. 00-1613 App. at 510. The district court thus fulfilled its obligations under *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 651 (1986) ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances . . . .").

Federal labor policy strongly favors arbitration, and "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers*, 753 F.2d 40, 43 (6th Cir. 1985) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). The district court compelled arbitration because it could not say "with positive assurance" that the dispute was not subject to arbitration. This finding, as the district court noted, would not be inconsistent with an arbitrator subsequently deciding that under the "merits and the specific facts of the particular grievance, it is not subject to arbitration."

As discussed in more detail below, we think that the Union's interpretation of the agreement is not simply one to which the agreement is susceptible, but is actually the only

fair reading of the guarantee. As the arbitrator pointed out, the guarantee includes a list of circumstances in which the guarantees are "interrupted" and a list in which they are "terminated." If an interruption permits the company to terminate guarantees without just cause, then the "termination" list is in some sense redundant. Since ordinary principles of contract interpretation call for interpreting an agreement so as to give meaning to every stated provision, interruption cannot provide the basis for termination. We think the parties intended "interruption" merely to provide a respite for the employer from paying wages and providing benefits to guarantee holders during one of the circumstances listed, in which the guarantee holder would be unable to contribute to the workplace in any real sense. The DNA has provided no authority for the proposition that the interruption of a guarantee permits an employer to terminate a guarantee holder without just cause or one of the other listed grounds for termination. Were we to accept the DNA's argument, it would mean that the employer could terminate the MOA as to employees on disability leave, in the armed services, absent on union business, or during periods in which newspaper production was suspended because of an Act of God. The unreasonableness of that conclusion is apparent.

As the Fourth Circuit has pointed out, arbitration makes particular sense in the context of lifetime employment guarantees. As that court explained:

> [L]ifetime job guarantees . . . owe their existence to the recognition, both by the relevant unions and the employers in the printing industry, that technological advances in that industry are gradually bringing about the demise of the bargaining unit and its bargaining power. Knowing that they would eventually lose the economic ability to enforce contract demands, the unions in negotiating these provisions traded opposition to management's availing itself of new

> technology for a guarantee of job security with an implicit covenant of good faith to provide an hourly wage that will be reasonable under all pertinent circumstances.

Cumberland Typographical Union No. 244 v. The Times Alleganian Co., 943 F.2d 401, 406-407 (4th Cir. 1991) (citation omitted).

Arbitration as a means of resolving disputes is more appropriate in this context than the traditional model of negotiation and economic bargaining, since part of labor's motivation for making concessions in order to obtain such guarantees was the recognition that technological changes had reduced labor's power at the bargaining table. *Id.* at 407.

Because we find that the guarantee could not be terminated by the unilateral discretionary action of the employer during the strike, unless that action met the termination requirements of the MOA, we turn to the whether the guarantees survived the expiration of the 1992-1995 collective bargaining agreement. In *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), the Supreme Court ruled that the right to arbitrate vested benefits survives the expiration of particular collective bargaining agreements: "[I]f a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions." *Id.* at 207-208. Section 11 of the MOA between the Union and DNA clearly provides that the MOA's provisions would remain "ongoing" even after the expiration of a particular collective bargaining agreement. The guarantees become part of future CBAs. Moreover, the 1992-1995 CBA stated explicitly in its incorporation of the guarantee that the guarantee would survive the expiration of the agreement. The Lifetime Guarantee MOA itself specifies that challenges to whether a separation was based on "just

cause" would be resolved "through the appeals provision of the labor contract," which, in the case of the 1992-1995 CBA, was arbitration. Clearly, under *Litton*, the guarantee is a benefit which continues after the agreement's expiration. "[I]f a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period." *Litton*, 501 U.S. at 205.

In a case over wage cuts in the face of a virtually identical lifetime job guarantee (with the same succession clause), the Fourth Circuit compelled arbitration even after the expiration of the agreement. *See Cumberland Typographical*, 943 F.2d 401 (4th Cir. 1991). The court held that the lifetime guarantee "continue[d] after the expiration of the main collective bargaining agreement," *id.* at 405, and thus provided a basis for ordering arbitration. The Seventh Circuit has reached a similar conclusion. *See Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510 (7th Cir. 1988). The DNA's efforts to distinguish the decisions from other circuits relied upon by the Union are unpersuasive. The DNA asserts that the right to a lifetime guarantee never existed for striking workers, and therefore that the right never "vested" so as to survive expiration. Since we hold that the lifetime guarantee could not be unilaterally terminated during a strike, we reject this argument. The right had fully vested, and therefore the dispute concerned interpretation of the 1992-1995 CBA in which the MOA was incorporated and thus should be resolved according to the arbitration provision of that agreement.

B. ENFORCEMENT OF AWARD

The DNA also appeals the district court's decision to grant summary judgment to the Union after the DNA sued to vacate the arbitrator's ruling. We review summary judgment upholding an arbitrator's ruling *de novo*, *see International Ass'n of Machinists v. Tennessee Valley Authority*, 155 F.3d

767, 771 (6th Cir. 1998), but apply the same standard as the district court. "[A]s long as the arbitrator is even arguably construing or applying the contract and is acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38 (1987). We do not hesitate to review arbitrator's decisions when they "depart [ ] from any conceivable interpretation of the contract." *Beacon Journal Pub. Co. v. Akron Newspaper Guild*, 114 F.3d 596, 600 (6th Cir. 1997). But as long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not the arbitrator's "own brand of industrial justice," it must be enforced. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Applying this exceptionally narrow standard, "one of the narrowest standards of judicial review in all of American Jurisprudence," *Lattimer-Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990), we find no basis for overturning the arbitrator's decision and thus affirm the ruling of the district court. The arbitrator applied accepted principles of contractual interpretation in concluding that a guarantee holder could not be terminated without just cause even during a strike, interpreting the agreement so that every provision had meaning. The circumstantial evidence provided by DNA's own termination letter (in which it said it was terminating Rusnell for just cause) and statement in arbitration (that just cause was the only issue to be arbitrated) provide support for the arbitrator's conclusion that the parties did not intend to permit unilateral discretionary termination of guarantee holders during strikes and lock-outs. The arbitrator also looked to another arbitration award under a similar provision in a contract between the DNA and a different union that reached the same conclusion--a lifetime guarantee holder cannot be terminated without cause, even during a strike. Ultimately, even if the DNA's interpretation of the

contract is correct (we think that it is not), the DNA still has not sufficiently demonstrated that the arbitrator's interpretation did not draw its "essence" from the agreement so as to justify overturning the award. That two arbitrators considering similar provisions for different unions' agreements reached the same conclusion suggests that the arbitrator in *this* case was not dispensing "his own" brand of industrial justice, but was rather reaching a sensible conclusion about the meaning of the MOA.

As to the DNA's argument that the arbitrator wrongly ignored the NLRB and Sixth Circuit orders prohibiting the Union from blocking entrances to the DNA's facilities, we agree with the district court that, even if this were error, it was harmless error and thus does not provide a basis for rejecting the arbitrator's award. The arbitrator made a factual finding that "Mr. Rusnell plainly did not, by himself, hinder any person's, or any potential person's, ingress to or egress from the building." There is no basis for believing that, in making this factual finding, the arbitrator exercised his own brand of industrial justice, and given those facts, it would be difficult to find that just cause existed to terminate Rusnell.

Finally, the DNA argues that the district court erred by not accepting its argument (made for the first time in its motion for reconsideration of the court's refusal to overturn the arbitrator's award) that confirming the arbitration award would violate the Norris-LaGuardia Act,[1] which forbids a court from granting injunctive relief in a labor dispute. The DNA relies on our decision in *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1124 (6th Cir. 1981), where we held that the Norris-LaGuardia Act would prevent the district court from

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[1] The relevant provision states: "No court of the Untied States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. § 104

ordering the E.W. Scripps Company to specifically perform a lifetime contract with members of the Typographical Union for the *Cincinnati Post* who lost their jobs when the Post merged with the *Cincinnati Enquirer* and the *Post*'s composing room was closed, leaving no work for typographers or printers at the *Post*. The affected *Post* employees sued for damages for breach of their lifetime employment agreement. The court, applying federal labor law, affirmed the district court's finding that the employees' rights remained enforceable after the expiration of the collective bargaining agreement.

The issue of Norris-LaGuardia arose because of plaintiffs' claim that if mitigation of their damages was required, they should be entitled alternatively to specific performance, although they had not sought that remedy. In holding that Norris-LaGuardia would preclude specific performance, the Court explained:

> The result [of accommodating and reconciling older statutes with newer ones] has been the creation of narrow exceptions to the broad anti-injunction provisions of the Norris-LaGuardia Act, principally the grant of specific performance against management of grievance arbitration clauses, and against unions of no-strike provisions, the quid pro quo of arbitration clauses.

Heheman, 661 F.2d at 1124 (citations omitted).

The *Heheman* Court noted that one of important exceptions from this general prohibition on injunctive relief carved out by the precedents was for matters pertaining to "the enforcement of the arbitration provisions of . . . contracts." *See id.* (citing *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 409 (1976)).

In upholding the district court's confirmation of the arbitration *award* we are enforcing the arbitration provision

of the contract, and not, as in *Heheman*, enforcing an employment contract. We are enforcing the dispute resolution mechanism to which the parties agreed. To do otherwise would render meaningless and unenforceable arbitration provisions that contemplate an award of specific performance. In the dispute in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court enforced an arbitration clause in regard to a dispute concerning "work loads and work assignments. "*Id.* at 449. The grievance at issue in *Lincoln Mills* clearly did not seek purely monetary relief in view of the nature of the dispute. The Court's order that the parties arbitrate would mean nothing if a subsequent court could not enforce the decision of the arbitrator. Employers and employees bargain for arbitrability clauses--and either party is free to insist on language limiting the possible remedies available to an arbitrator. But when the arbitrator has ordered reinstatement, the district court's enforcement of such an award merely carries out the parties' intention to resolve the dispute through the vehicle of arbitration. Thus, such enforcement does not run afoul of Norris-LaGuardia.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court ordering arbitration and its judgment enforcing the arbitrator's award.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Consolidated Action
Case numbers: 97-CV-74551 97
CV-75553

DETROIT TYPOGRAPHICAL UNION, LOCAL No. 18,
and DETROIT NEWSPAPER UNION, LOCAL 13-N,
GRAPHIC COMMUNICATIONS
INTERNATIONAL UNION, AFL-CIO,
Plaintiffs,

v.

DETROIT NEWSPAPER AGENCY, d/ b/ a
DETROIT NEWSPAPERS,
Defendant.

Honorable Julian Abele Cook, Jr.

ORDER

On December 12, 1997, the Plaintiffs in this cause, Detroit Typographical Union, Local No. 18 (Local 18), and Detroit Newspaper Union, Local 13-N, Graphic Communications International Union, AFL-CIO (Local 13-N), filed motions for summary judgments in which they requested that the Court stay this action and compel arbitration. For the reasons that have been stated below, these motions are granted.

I.

This case arises out of a strike by Local 18 and Local 13-N, among other unions, against the Defendant, Detroit Newspapers Agency (DNA)[1]. The strike began in July 1995. After striking for nearly two years, these two unions made an unconditional offer to return work and ended their strike in February 1997. The present dispute involves the DNA's refusal to reinstate sixteen members of Local 18 and fifteen representatives of Local 13-N. Following the unions' unsuccessful efforts to resolve the dispute through the grievance process, they sought arbitration.

When the DNA rejected their bid for arbitration, the unions filed the instant lawsuit, asserting that the DNA's refusal to reinstate these employees violates lifetime job guarantees that these union members held. In the unions' summary judgment motions, they collectively seek an order that would (1) require the DNA to submit this issue to binding arbitration, or (2) declare that the DNA had breached the members' job guarantees and grant reinstatement, back pay, lost benefits, and other appropriate damages.[2]

In its opposition papers, the DNA argues that the union members who were not reinstated were lawfully discharged because (1) they had engaged in strike misconduct, or (2) each of them had attained the age of 65 as of February 14, 1997, the date on which the unions offered to return to work.[3]

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[1] The DNA is a partnership of two large publishing companies, Gannett and Knight-Ridder. Gannett is the parent company of the Detroit News. Knight-Ridder is the parent company of the Detroit Free Press. Gannett and Knight-Ridder consolidated the publishing functions of these two newspapers in November 1989, pursuant to a joint operating agreement (JOA).

[2] These cases have been formally consolidated before this Court by the terms of an Order entered October 14, 1997.

[3] The DNA also notes that one individual, Steven Olter, who is a member of Local 13-N, was never named in any job guarantee provision.

Thus, the DNA contends that it never agreed to arbitrate the discharges of those individuals who did not have job guarantees[4] and, hence, the imposition of compulsory arbitration on this issue would be without any legal basis.

A.

The history of the legal relationship between Local 18 and the DNA began on June 18, 1974, when the Detroit News and the Detroit Free Press entered into separate collective bargaining agreements, which included separate supplemental Memoranda of Agreement (MOAs). In its response to Local 18's Complaint in the case at bar, the DNA admitted that it agreed to adopt these MOA job guarantee provisions on February 16, 1988.

These MOAs give specifically named employees, who are members of Local 18, job guarantees until they reach the age of 65.[5] The pertinent portion of one of the MOAs states:

> The names of those claiming these positions shall be enrolled on the Job Guarantee Roster and extended a job guarantee until attainment of the employees [sic] sixty-fifth (65) birthday, or the employee's death, whichever shall occur first.

Thus, the DNA submits that he must be dismissed from Local 13-N's Complaint. Local 13-N has not responded to this argument.

[4] The parties have also made several other motions. For example, the DNA asserts that the two cases before the Court should be stayed in order to avoid inconsistent results with the litigation currently pending before the National Labor Relations Board (NLRB). In addition, the Plaintiffs have filed motions to stay discovery pending a decision on their motions for a summary judgment. The DNA has responded with motions to compel discovery, to which it has also requested an expedited hearing.

[5] When the Detroit News and the Detroit Free Press entered into the JOA in November 1989, *see supra* note l, it became the employer of these individuals

This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:

(1) Strike or lockout.

(2) Disability of the guarantee holder.

(3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.

(4) Leave of absence of priority holder.

(5) Time off for Union business.

(6) Service in the Armed forces.

This guarantee shall be terminated for the following causes:

(1) Resignation of the guarantee holder.

(2) Death of the guarantee holder.

(3) *Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.*

(4) Attainment of sixty-fifth (65) birthday by the guarantee holder.

(5) Permanent suspension of publication.[6]

It is undisputed that the most recent collective bargaining agreement between Local 18 and the DNA expired on April 30, 1995. However, the MOAs continue beyond the term of any collective bargaining agreement. Section 11 to one of the MOAs states:

MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT, 6-18-74 TO 6-17-77:

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[6] Pl. Local 18 Br. Mot. Summ. J., Ex. 1, § 2, at 3 (emphasis added).

> . . . .This Memorandum of Agreement shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties.[7]

B.

DNA's legal relationship with Local 13-N is substantively similar to its relationship with Local 18. Local 13-N and the DNA were parties to a collective bargaining agreement which was effective from May 19, 1992 to April 30, 1995. Section 32(c) of their collective bargaining agreement contained a job guarantee provision, which reads in relevant part:

> Job Guarantees:
>
> Those journeymen on the lifetime guarantee lists of the News and Free Press shall be guaranteed by name to have five (5) day/night situations within the jurisdiction of the Union until attainment of the age of mandatory retirement as allowed by Federal law. These guarantees will terminate on the occurrence of any one of the following:
>
> -death
>
> -retirement
>
> -voluntary separation
>
> *-discharge for cause.*
>
> *The above guarantee commitment shall endure beyond the term of any specific Collective Bargaining Agreement executed between the parties.*
>
> In the event of a suspension of the employer's newspaper operation, the guarantees will be suspended for such period of suspension. *In case of strike*, work

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[7] Pl. Local 18 Br. Mot. Summ. J., Ex. l, § 11, at 6

> stoppage, or lockout of pressroom employees, *such guarantees will be temporarily suspended for period of such strike*, work-stoppage or lockout.
>
> In the event of an economic reversal or other emergency, the parties hereto will confer for the purpose of determining appropriate action. Any such action would be by mutual agreement.[8]

The DNA acknowledges that this job guarantee provision extends beyond the life of any collective bargaining agreement, including the parties' contract which expired in April 1995.

II.

Federal Rule of Civil Procedure 56 governs summary judgment motions. Subsection 56(c) provides, in part, that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the burden of demonstrating that there is no genuine issue as to any material fact, and a summary judgment is to be entered if the evidence is such that a reasonable jury could find only for the moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250.

In assessing a summary judgment motion, the court must examine any pleadings, depositions, answers to interrogatories, admissions, and affidavits in a light that is most

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[8] Pl. Local 13-N Br. Mot. Summ. J., Ex. A, § 32(c), at 20 (emphasis added).

favorable to the non-moving party. Fed. R. Civ. P. 56(c); *see United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962); *Boyd v. Ford Motor Company*, 948 F.2d 283, 285 (6th Cir.1991), *cert denied*, 503 U.S. 939 (1992); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984). It is not the role of the court to weigh the facts. *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir.1987). Rather, it is the responsibility of the judge to determine "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

III.

The general principles by which courts must be guided when deciding whether arbitration must be compelled in disputes between employers and unions are well summarized in *Cumberland Typographical Union No. 244 v. The Times Alleganian Co.*, 943 F.2d 401 (4th Cir.1991). In that case, the Fourth Circuit wrote:

> [u]nder the first principle, the parties must have contracted to submit the grievance to arbitration. The second principle requires that the court determine whether the contract provides for arbitration of the particular grievance in question. The third principle demands that the court not decide the merits of the grievance while determining the arbitrability of the dispute. Finally, if the contract contains an arbitration clause, a presumption of arbitrability arises. The court should not decline to order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Cumberland, 943 F.2d at 404 (citation omitted); *AT&T Tech., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 648-50 (1986).

The DNA cannot legitimately argue that arbitration is improper in these causes simply because the agreements with the unions have expired. In *Nolde Bros. v. Bakery & Confectionary Workers Union*, 430 U.S. 243 (1977), the Supreme Court significantly undermined the argument that arbitration cannot be compelled when the applicable collective bargaining agreement has expired. The Court in *Nolde* ruled that arbitration must be ordered when a dispute "arises under" the collective bargaining agreement, which occurs when a resolution of an obligation that was arguably created by the expired collective bargaining agreement "hinges on the interpretation ultimately given the contract." *Nolde*, 430 U.S. at 249.

In 1991, the Supreme Court limited the potential reach of *Nolde*, holding that it did not create a broad rule that "postexpiration grievances concerning terms and conditions of employment remain arbitrable." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991). However, it validated the rationale behind *Nolde*, which created a presumption in favor of arbitration as to disputes "arising under" the contract. *Litton*, 501 U.S. at 205. Attempting to more precisely define when this situation occurs, the Court wrote:

> [a] postexpiration grievance can be said to arise under the contract only where [(1)] it involves facts and occurrences that arose before expiration, [(2)] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [(3)] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Litton, 501 U.S. at 205-06.

In the cases at bar, the second *Litton* condition has been met, and arbitration should be ordered. Both the Plaintiffs and

the DNA agree that the discharges at issue occurred after the expiration of the applicable agreements. Moreover, under their plain language, the lifetime job guarantees vested under the agreement. See Cumberland, 943 F.2d at 405 ("the job guarantee right is a vested right that continues after the expiration of the main collective bargaining agreement.") "Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement." Litton, 501 U.S. at 207.

Alternatively, the third *Litton* condition provides this Court with another basis upon which to compel arbitration. The collective bargaining agreement between Local 13-N and the DNA explicitly states that "[t]he . . . guarantee commitment shall endure beyond the term of any specific Collective Bargaining Agreement executed between the parties." "[U]nder normal principles of contract interpretation," this contractual right survives the expiration of the remainder of the agreement, and thus a dispute as to it "arises under" the contract. *Litton*, 501 U.S. at 206. This again argues in favor of compelling arbitration.

> [I]f a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.

Litton, 501 U.S. at 207-08. Although not as explicit, a strong argument can be made that the MOA applicable to Local 18 provides that the job guarantee provisions are to survive past the mere expiration of any agreement.[9] Thus, normal contract

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[9] The relevant portion of the MOA is entitled "MEMORANDUM TO . . . EXTEND BEYOND LABOR AGREEMENT," and it states (emphasis added): "[t]his Memorandum of Agreement *shall be ongoing* and part of all future collective bargaining agreements."

interpretation principles, when coupled with the presumption in favor of arbitration,[10] favor compelling arbitration of these disputes.

The DNA's arguments against arbitration are unpersuasive. The DNA's primary argument is that no job guarantees existed during the strike, and thus it validly discharged (1) union members who engaged in strike misconduct, and (2) union members who turned 65 before the return to work offer was made. First, this argument fails because it (1) asks the Court to decide the merits of the case, and (2) presumes that the merits will be decided in favor of the DNA. However, it is improper to reach the merits of this type of a dispute before deciding whether it is subject to arbitration. *AT&T Tech.*, 475 U.S. at 649.[11] An acknowledgment of this principle leads to

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[10] *Litton*, 501 U.S. at 208 ("We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement."); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.")

[11] The language from this opinion is instructive regarding the zeal with which courts are to avoid the merits of a dispute.

> Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

AT&T Tech., 475 U.S. at 649 (citation omitted). The language of the Supreme Court which prohibits consideration of "whether there is equity in a particular claim" compels the determination, for example, that it

the second, and perhaps more important, flaw in the DNA's position (to wit, the issue before the Court is whether the union members held valid job guarantees). Instead, the issue before the Court in connection with the unions' motion for a summary judgment is *what forum* these issues should be decided in—this judicial forum, or an arbitration forum.

Accordingly, for the reasons that have been stated above, the Court grants the Plaintiffs' motions for a summary judgment. These actions are stayed and the parties are ordered to proceed to arbitration.

IV.

The Plaintiffs have filed separate motions to stay the DNA's requests for discovery, pending a resolution of their motions for a summary judgment. They argue that discovery should be stayed to protect them from undue burden and expense, pursuant to Fed. R. Civ. P.26(c) (1)[12], which is exactly the end that arbitration is designed to accomplish. The unions also argue that discovery will not aid in the resolution of their summary judgment motions.

The DNA has opposed those motions, and in response fled motions to compel discovery in each case. However, the DNA's position is premised on their erroneous characterization of the issue before the Court. For example, the DNA argues that it needs discovery in order to further

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would be improper to address the DNA's contention that the union members are not entitled to equitable remedies because they have unclean hands.

[12] That provision states:

> (c) Upon motion by a party or by the person from whom discovery is sought, . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the disclosure or discovery not be had . . . .

verify whether certain union members had reached 65 before the return to work offer, because "[t]here can be no dispute that whether individuals over age 65 possessed a vested right to a job guarantee is one of the central issues pending before the court."[13] To the contrary, the issue before the Court is what forum such claims should be litigated in—not the merits of those claims.

The analysis that is applicable to the Plaintiffs' motions for a summary judgment is not dependent on any contested factual issue. Instead, their resolution depends only on uncontested contract language and settled legal precedent. Based on the information currently available, the Court fails to anticipate any factual information that could change the analysis that is applicable to those motions. Thus, all pending motions related to discovery are denied for mootness.

V.

Accordingly, for the reasons that have been stated above, the motions for a summary judgment filed by Local 18 and Local 13-N are granted. These causes of action are stayed and the parties are ordered to proceed with arbitration forthwith. All other pending motions are denied as moot.[14]

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[13] Def. Reply Br. Cross-Motion Compel Disc. & for Expedited Hr'g, at 1.

[14] For example, the DNA has filed a motion seeking to stay this action on the ground that proceeding could result in inconsistent results with currently pending litigation before the NLRB. The unions have responded that the issues in the NLRB proceedings are distinct from the issues currently before this Court, because the NLRB proceedings involve whether the DNA violated the National Labor Relations Act, whereas the case before the Court involves only contract right interpretations. Although the Court has been provided with very little information regarding this issue, it is apparent that the DNA's motion must be denied as moot.

IT IS SO ORDERED.

Dated: 3 Mar 1998
Detroit, Michigan

/s/ Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 97-CV-74551

Honorable Julian Abele Cook, Jr.

DETROIT TYPOGRAPHICAL UNION, LOCAL NO.18,
Plaintiff,

v.

DETROIT NEWSPAPER AGENCY,
d/ b/ a DETROIT NEWSPAPERS,
Defendant.

ORDER

On October 13, 1998 the Plaintiff, Detroit Typographical Union, Local No. 18 (Local 18 or the Union), filed a motion for contempt, costs, and attorney fees against the Defendant, Detroit Newspapers Agency (DNA).[1] In its motion, Local 18 asserted that the DNA was in violation of an Order that had been entered by the Court on March 3, 1998, which had stayed this action and required the parties to submit their dispute to arbitration. On November 18, 1998 Magistrate Judge Virginia Morgan, to whom the motion had been referred by the Court, submitted a Report in which she recommended that Local 18's application for relief be denied.

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[1] The DNA is a partnership of two large publishing companies, Gannett and Knight-Ridder. Gannett is the parent company of the Detroit News. Knight-Ridder is the parent company of the Detroit Free Press. Gannett and Knight-Ridder consolidated the publishing functions of these two newspapers in November 1989 pursuant to a joint operating agreement.

Having reviewed the parties' pleadings in conjunction with Local 18's objections, the Court concludes that the Report must be accepted in part and rejected in part, as explained in greater detail below.

I.

This case arises out of strike in July 1995 by Local 18, along with other unions, against the DNA. In February 1997, Local 18, after striking for nearly two years, participated in an unconditional return to work offer and ended its strike. However, when the DNA refused to reinstate sixteen members of Local 18 to their former employment, this lawsuit followed. In its Complaint, Local 18 sought, in part, to obtain an order that would require the DNA to submit the issue of whether the action by the DNA violated the affected employees' lifetime guarantees to binding arbitration.

On March 3, 1998, the Court stayed all further proceedings in the case at bar and directed the parties to proceed to arbitration "forthwith." [2] Thereafter, Local 18 and the DNA agreed to present their respective positions relating to the legitimacy, if any, of the reinstatement issue to five arbitrators. During the first scheduled arbitration hearing, a dispute arose, in which the DNA maintained that (1) the Union's grievance was not subject to arbitration, and (2) it was within the authority of the arbitrator to decide the arbitrability of the issue in controversy. Local 18 challenged this argument, contending that these issues had been previously addressed and resolved by the Court on March 3, 1998.

When the parties were unable to resolve this dispute, Local 18 filed a motion with this Court, in which it sought, among other things, to obtain a judicial determination that the DNA was in contempt for its alleged violation of the March 3, 1998 directive. In her Report to this Court, Magistrate Judge Morgan opined that the March 3d Order (1) only decided the

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[2] March 3d Order at 11.

forum in which the dispute between the parties was to be resolved, and (2) neither addressed nor attempted to decide any of the contested issues. Therefore, it was her opinion that the Order of March 3, 1998 did not preclude the DNA from raising its defense (to wit, the individual grievances were not arbitrable) during the parties' arbitrations.

II.

In its evaluation of the merits of the concerns that have been raised by Local 18, this Court (1) is required to engage in a de novo review of those portions of the Magistrate Judge's Report to which objections are timely lodged, and (2) "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." 28 U.S.C. § 636(b)(1)(C).

Local 18, in expressing its objections to the Report, generally asserts, in part, that (1) Magistrate Judge Morgan misinterpreted the content and purpose of the Order of March 3d, and (2) her recommendation, if adopted by the Court, would permit the DNA to present arguments to the arbitrator that had been specifically rejected by the Court.

A. First Objection by Local 18:

Local 18 initially objects to a portion of the Report (to wit, the Union "claims DNA refused to attend with the [sic] arbitration")[3] which, in its opinion, is inaccurate. According to Local 18, it never claimed that the DNA refused to attend the arbitration.

In the opinion of the Court, Local 18's objection is based on its misreading of the Report, which states that it "claims DNA refused to *go forward* with the arbitration."[4] While the Court is fully aware of the distinctions and the legal

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[3] Pl. Objections to Report and Recommendation at 4.

[4] Report and Recommendation at 1 (emphasis added).

implications between a party's refusal "to attend" a hearing and its refusal "to go forward" with an arbitration, these semantic differences are insufficient to affect its judgment with regard to the adversarial positions of the parties in this controversy. Hence, the Court will reject the Local 18's argument on this point without any additional comment.

B. Second Objection by Local 18:

The second objection by Local 18 is to a statement within the Report that it "filed suit against DNA to compel arbitration of 16 grievances filed by former DNA employees regarding their request for post-strike reinstatement based on alleged job guarantees." [5] Local 18 claims that this representation is inaccurate, noting that it filed a single group grievance (in contrast to sixteen separate arbitrations) in protest over the DNA's refusal to reinstate sixteen union members.

However, this dispute is immaterial to the present controversy because both of the parties acknowledge that, despite their disagreement over many substantive issues, they agreed to process the sixteen grievances in five arbitration hearings.

Local 18 also objects to the language within the Report which indicates that the union members had only "alleged job guarantees." Local 18 argues that its members' job guarantees is an uncontroverted fact, not merely an allegation. This objection is without merit as the existence of valid job guarantees is at the very heart of the dispute between the parties.

Consequently, the Court will decline to accept Local 18's objections and, as a consequence, it will accept the portion of the Report and Recommendation that is the subject of Local 18's second objection.

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[5] Report and Recommendation at 1.

C. Third Objection by Local 18:

Local 18's third objection is to the following language from Magistrate Judge Morgan's Report:

> DNA argued before Judge Cook that the grievances were not subject to arbitration because they were filed by individuals who did not have job guarantees and DNA never agreed to arbitrate the discharges of such individuals. Judge Cook specifically rejected this argument because resolution of that issue would have required the court to assess the merits of the case, and as Judge Cook stated, "it is improper to reach the merits of this type of dispute before deciding whether it is subject to arbitration." See J. Cook's 3/3/98 order at 9; *see also AT&T Tech., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 648-50 (1986); *Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 557 (1964). It is clear from Judge Cook's order that he made no findings regarding the merits of any of DNA's claims or defenses and he was careful to address the only issue before him—"what forum such claims should be litigated in." See J. Cook's 3/3/98 order at 9. He determined only that the proper forum for the resolution of the dispute was arbitration; he did not decide whether the individual grievances were subject to arbitration under the terms of the collective bargaining agreement.[6]

According to Local 18, this recitation is contrary to provisions within the Order of March 3d because the Court had specifically determined arbitrability and found that the grievance was subject to arbitration. Local 18 also contends that the statements of the Magistrate Judge contravene Supreme Court precedent which instruct that it is the responsibility of the courts, not arbitrators, to decide the issue of arbitrability.

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[6] Report and Recommendation at 3.

Local 18 is correct in asserting the rule that the issue of arbitrability of a labor dispute is resolved by the courts. *See AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). This general assertion, however, is overly broad when it is applied to the case at bar because courts are not to decide whether a particular dispute is arbitrable in all respects. Instead, courts are to rule only on the limited question of whether the dispute between the parties falls within the arbitration clause of their collective-bargaining agreement. *See id.* at 652. The Supreme Court has characterized "the question of arbitrability," which "is undeniably an issue for judicial determination," as being "whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance." *Id.* This is the only issue that was addressed by the Order of March 3, 1998.

The limitation on a judicial re view of the arbitrability of labor disputes is consistent with another axiomatic principle; namely, "that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Id.* Rather, a determination on the merits of the respective parties' claims is left to the arbitrator in a manner that is consistent with the terms within the collective bargaining agreement (CBA). *See* 48A Am. Jurisdiction. 2d *Labor and Labor Relations* §§ 3356-57 (1994). This limitation on federal court review is so stringent that:

> even if it appears to the court to be frivolous, the . . . claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the

> written instrument which will support the claim. The agreement is to submit all. grievances to arbitration not merely those which the court will deem meritorious."

AT&T Techs., 475 U.S. at 649-50 (quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)). Consequently, no inconsistency results from (1) a court deciding that the subject matter of a dispute between a union and an employer is covered by the arbitration clause in their CBA, (2) the parties proceeding to arbitration, and (3) an arbitrator deciding that, based on the merits and the specific facts of the particular grievance, it is not subject to arbitration.[7]

This distinction, although somewhat difficult to grasp in the abstract, becomes easier to understand in specific situations. For example, with regard to the two arbitrations that are currently pending, the DNA has asserted five common defenses, as well as a sixth issue that has been raised in only one of the hearings. One of the common defenses that has been advanced by the DNA is that the job guarantee, which Local 18 is seeking to enforce on behalf of its members, was not in effect at the time of their discharge from employment. Inasmuch as Local 18 is claiming a right to the reinstatement of these former employees on the basis of their job guarantees under the CBA, this defense goes to the merits of the dispute between the parties. Hence, in the judgment of the Court, this is an issue that is properly before an arbitrator.[8]

In addition to generally having exclusive authority to resolve the merits of a labor dispute, arbitrators are also assigned the responsibility of resolving procedural questions

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[7] Parenthetically, Local 18 objects to this conceptual division between the arbitrability of the "subject matter" of a dispute as opposed to "specific" grievances. As explained in detail below, *infra* at 9-11, this objection lacks merit because this division provides the very basis for delineating the respective role of courts and arbitrators in resolving labor disputes.

[8] March 3d Order at 8-9.

regarding the availability of arbitration. "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Two of the common defenses which have been asserted by the DNA fall within this category and are properly before an arbitrator.

For instance, the DNA contends that two members of Local 18 failed to comply with the grievance procedures within the CBA which address the submission of claims. As a consequence, it is the DNA view that these former employees waived any right to challenge their own termination of employment. This is a classic procedural arbitrability issue that, according to the Supreme Court, is properly reserved for the arbitrator. "Doubt whether grievance procedures or some part of them . . . have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration," and, consequently, it is a question for the arbitrator to decide since courts may not consider the merits of labor disputes which the parties by contract have devoted to arbitration. *Wiley & Sons*, 376 U.S. at 557; *see also* 48A Am. Jurisdiction. 2d *Labor and Labor Relations* § 3358 & n.60 (1994).

The other procedural defense to arbitration which has been raised by the DNA is that, even if its CBA with Local 18 is controlling, the two union members whose arbitrations are pending failed to file a timely grievance. "Since the disposition of procedural matters are a matter of contract interpretation, the arbitrator, as the person selected to interpret the contract, rather than the court, must answer questions such as . . . whether arbitration has been claimed in a timely manner. . . . Procedural issues dealing with the

timeliness of the underlying grievance are . . . properly reserved for decision by the arbitrator." 48A Am. Jurisdiction. 2d *Labor and Labor Relations* § 3358 & nn.61, 64 (1994); *see also Oil, Chem. & Atomic Workers' Int'l Union Local 4-447 v. Chevron Chem. Co.*, 815 F.2d 338, 341 (5th Cir.1987); *Beer, Soft Drink, etc., Local Union 744 v. Metropolitan Distribs., Inc.*, 763 F.2d 300, 303 (7th Cir. 1985); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 4 (S.D.N.Y.1974).

Consequently, to the extent that the DNA is raising defenses to arbitrability that (1) concern the merits of its dispute with Local 18, or (2) constitute procedural attacks on an employee's claimed right to arbitration, this objection to the Report must be rejected because these are matters that are properly before the arbitrator.

D. Fourth Objection by Local 18:

Local 18 maintains that Magistrate Judge Morgan applied an incorrect legal test in the following portion of her Report by creating a new distinction between the arbitrability of (1) the "subject matter" of a dispute, and (2) an individual grievance:

> The Union argues that DNA is in contempt because it has objected to arbitration where the court has already determined that the claims are subject to arbitration. The Union reads Judge Cook's order much too broadly and attempts to extract from its pages a result that was not reached and was even specifically disavowed by the court. The Union overlooks the crucial distinction between the arbitrability of [the] subject matter of the dispute and the arbitrability of the individual grievances. Judge Cook's order addresses only the former. Whether the individual grievances are subject to arbitration is a matter before the arbitrator and DNA properly raised its arguments in that forum. DNA has not refused to submit

> to arbitration. It has simply raised defenses that go to the arbitrability of individual claims. By appearing at the September 18, 1998 proceeding and raising its defenses, DNA complied with Judge Cook's order. It could be argued that the Union has contemptuously failed to comply with the order by adjourning the October 14, 1998 proceeding and filing this motion rather than responding to the merits of DNA's defenses at arbitration. In any event, a finding of contempt would effectively preclude DNA from raising defenses that Judge Cook declined to address. This would be an unfair and illogical result. Accordingly, the Union has failed to demonstrate by clear and convincing evidence that DNA violated Judge Cook's order.[9]

According to Local 18, the standard Magistrate Judge Moran created is contrary to Supreme Court precedent that "the second [labor law] rule [set out in the *Steelworkers Trilogy*] . . . is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to *arbitrate the particular grievance*—is undeniably an issue for judicial determination." *AT&T Techs.*, 475 U.S. at 649 (emphasis added); *see also Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960) (repeatedly using term "particular grievance"). Local 18 submits that (1) this language from *AT&T Techs.* precludes the distinction drawn by Magistrate Judge Morgan, and (2) the Court, in its application of the Supreme Court text in the March 3d Order, found that the specific grievance brought on behalf of its sixteen union members was subject to arbitration.

Based on the use of the term, "particular grievance," by the Supreme Court in *AT&T Techs.* Local 18's position is justifiable. However, a more complete reading of the *AT&T Techs.* opinion, as well as other labor law precedent, leads this Court to the conclusion that this passage within *AT&T*

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[9] Report and Recommendation at 3-4.

Techs. is misleading for several reasons because the distinction between the subject matter of a labor law dispute and the specifics of a given grievance is the determinative factor in delineating the role of courts and arbitrators in this legal area.

First, although the Supreme Court in *AT&T Techs.* used the term "particular grievance," an examination of the opinion reveals that in substance it insisted in reviewing only whether the subject matter of the dispute between the union and employer was subject to arbitration, rather than determining if an arbitration was required on the basis of the facts that are specific to the grievance. In that case, the union contested the employer's lay-off of union workers, contending that a collective bargaining provision pertaining to lay-offs in the case of "lack of work" controlled. *AT&T Techs.*, 475 U.S. at 644-46. The employer argued that a different provision applied. *Id.* at 646. The concluding language by the Supreme Court demonstrates that the relevant issue for federal court review was whether the general nature of the dispute fell within the ambit of the CBA's arbitration clause:

> It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration. . . . . The issue in the case is whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause.

Id. at 651-52.

Second, other important labor law cases, as well as the secondary sources that review them, also apply this same "subject matter" standard in fulfilling the role of the court in determining whether a dispute is subject to arbitration. *See Wiley & Sons*, 376 U.S. at 555 ("It is sufficient for present purposes that the demands are not so plainly unreasonable that *the subject matter of the dispute* must be regarded as nonarbitrable . . . .") (emphasis added); *Denhardt v. Trailways, Inc.*, 767 F.2d 687, 690 (10th Cir.1985); *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446, 453 (4th Cir.1997); *United Rubber, Cork, Linoleum, & Plastic Workers of Am., Local 164 v. Pirelli Armstrong Tire Corp.*, 104 F.3d 181, 183 (8th Cir.1997); *Local 285, Serv. Employees Intl Union v. Nonotuck Resource Associates, Inc.*, 64 F.3d 735, 739 (lst Cir.1995); *see also* 48A Am. Jur. 2d *Labor and Labor Relations* § 3424 (1994) ("Once it is determined that the parties are obligated to submit *the subject matter of a dispute* to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.") (emphasis added).

Therefore, Local 18's fourth objection is rejected because the distinction that was drawn by Magistrate Judge Morgan between the arbitrability of the subject matter of a labor dispute and an individual grievance is a valid one.

E. Fifth Objection by Local 18:

Local 18 also objects to the following language within the Report:

> [t]he Union also argues that DNA raised objections to arbitration that were not presented to the district court and should therefore be deemed waived. It is true that DNA raised additional objections to arbitration after Judge Cook's order was entered. However, it is likely that the court would have declined to address these claims because, like the claims raised before him, their

> resolution would have touched on the merits of the dispute. Again, courts must refrain from reaching the merits of a dispute in deciding whether the subject matter of the dispute is subject to arbitration. The Union's claim is without merit."[10]

It is Local 18's contention that, in contrast to the position that has been taken by the Magistrate Judge, the DNA's defenses have been waived, inasmuch as none of them touch upon the merits of the grievance, but pertain to substantive issues of arbitrability that should have been presented to the Court on its motion for summary judgment to compel arbitration.

This argument must be rejected insofar as it concerns the DNA's defenses that go to the merits of the dispute or which represent procedural attacks on Local 18's claimed right to arbitration, all of which have been identified earlier.[11] However, Local 18's argument is well-taken with regard to two of the defenses that were raised by the DNA before the arbitrator; namely, that (1) even if the relevant union member's job guarantee was in effect at the time of the discharge, it does not provide for arbitration as a means of its enforcement, and (2) the union member is not entitled to seek arbitration because he was not working in a position that was covered by a CBA. Each of these defenses challenges whether arbitration is even available to resolve the subject matter of Local 18's grievance. These defenses should have been presented to the Court by the DNA in its opposition to Local 18's motion for a summary judgment. The initial determination of whether the parties agreed to employ arbitration as the means by which to resolve the subject matter of any given dispute is for the Court to decide.

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede

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[10] Report and Recommendation at 4-5 (footnote and citations omitted).

[11] *See supra* at 7-9.

> judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

Wiley & Sons, 376 U.S. at 547.

The record reflects that the DNA submitted a variety of defenses to the Court when it contested Local 18's motion for a summary judgment. For instance, the DNA argued that arbitration was unavailable to the parties because the job guarantees were interrupted during the period of the strike. The Court, in its March 3d Order, refused to address that defense in order to avoid becoming entangled in the merits of the parties' dispute. Therefore, the DNA may submit its defense (to wit, the job guarantees whose enforcement is sought by Local 18 were not in effect at the time of the discharges) to the arbitrator.[12] On the other hand, the DNA never contended during its appearance before the Court in connection with the summary judgment issue that arbitration was unavailable to the parties even if the job guarantees were in effect. The same is true of the DNA's other newly asserted. defense; namely, that the union members were not covered by a CBA and, thus, could not claim a right to arbitration. *Wiley & Sons* prescribes that, if presented with this issue at an appropriate time (such as during the hearing on Local 18's motion for summary judgment), this Court would have been obligated to address and evaluate the DNA's position with regard to arbitration.

Therefore, the Court concludes that the DNA waived these two defenses when it failed to raise them in its opposition papers to Local 18's motion for a summary judgment to compel arbitration. As this case exemplifies, any other result

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[12] *See supra* 7 & n.8.

would undermine one of the primary goals of labor law and its use of arbitration; namely, to provide for the prompt and final resolution of labor disputes.[13]

The DNA is also barred from raising its defense; namely, even if the job guarantee was in effect, it did not provide for arbitration, because this would conflict with the Order of March 3, 1998, in which the Court determined that the parties had contracted to submit the subject matter of the grievance to arbitration.[14] The same result must also be applied to the DNA's last defense; to wit, even if the union members' claims were subject to arbitration, the CBA had expired. This claim was specifically rejected by the Court on March 3, 1998 when it declared that "[t]he DNA cannot legitimately argue that arbitration is improper in these causes simply because the agreements with the unions have expired," and relied upon *Nolde Bros. Inc. v. Bakery & Confectionary Workers Union*, 430 U.S. 243 (1977) and *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991) to conclude that the dispute between Local 18 and the DNA "arose under" the expired agreement and was subject to its arbitration clause.[15]

Labor law and policy compels the conclusion that it is improper to present an issue to an arbitrator that has already been decided by a court of law. An arbitrator's authority is derived solely by contract pursuant to the CBA. *See AT&T Techs.*, 475 U.S. at 648-49. Thus, contrary to the authority of the judiciary, the arbitrator has no inherent power to issue decisions which bind the parties. Commensurately, the

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[13] *See Occidental Chem. Corp. v. International Chem. Workers Union*, 853 F.2d 1310, 1315 (6th Cir.1988); *see also Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 228 (4th Cir.1991); *United Paperworks Int'l Local No. 395 v. ITT Rayonier, Inc.*, 931 F.2d 832, 838 (11th Cir.1991).

[14] March 3d Order at 6; *see also AT&T Techs.*, 475 U.S. at 648; *Wiley & Sons*, 376 U.S. at 547.

[15] March 3d Order at 6.

arbitrator must follow federal law, which governs all questions regarding the interpretation, validity, and enforceability of an arbitration agreement. *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561, 564 (S.D.N.Y.1978); *see also* 48A Am. Jurisdiction. 2d *Labor and Labor Relations* § 3356 & n.48 (1994). Allowing an arbitrator to decide an issue that has already been ruled upon by a federal court would violate this principle as well as the commands of the law of the case doctrine. It would also contravene the goal of achieving "the prompt and final resolution of labor disputes that is at the heart of labor law principles favoring arbitration," [16] as well as the finality of judicial decisions, by raising the probability of multiple litigations of the same issue by the same parties.

Therefore, Local 18's fifth objection is meritorious with respect to the three projected defenses by the DNA which have been specified in this section. Hence, the relevant portion of the Report is accepted in part and rejected in part.

F. Sixth Objection by Local 18:

The final objection by Local 18 pertains to the recommendation within the Report, in which Magistrate Judge Morgan wrote:

> [t]hough this court agrees that the Union's motion is somewhat ill-conceived, sanctions are inappropriate at this time. The Union's position in this motion reflects a misunderstanding of both Judge Cook's order and prevailing case law. An accusation of the serious charge of contempt should be grounded in more compelling legal and factual arguments than those presented here.[17]

In order to have the DNA held in contempt, Local 18 has the burden of "establishing by clear and convincing evidence that the [nonmoving party] 'violated a definite and specific

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[16] *Occidental Chem. Corp.*, 853 F.2d at 1315.

[17] Report and Recommendation at 5.

order of the court requiring [it] to perform or refrain from performing a particular actor acts with knowledge of the court's order.'" *Rolex Watch U.S.A.. Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir.1996) (quoting *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir.1987)). Willfulness is not an element of civil contempt, and therefore the DNA's intent to disobey the Court's March 3d Order is irrelevant. *See In Jaques*, 761 F.2d 302, 306 (6th Cir.1985).

The Court has some concern about the propriety, if any, of the DNA submitting a defense to an arbitrator that the expiration of the CBA precluded any resort by Local 18 to the grievance and arbitration procedure since this issue was decided by the Court on March 3d.[18] On the other hand, the DNA's position was not so frivolous as to have been rejected by Magistrate Judge Morgan as a baseless argument.

With recognition that each party has in essence prevailed on half of the defenses asserted by the DNA, the Court will accept Magistrate Judge Morgan's recommendation to deny Local 18's motion for contempt, costs, and attorney fees.

III.

Accordingly, the Court will accept in part and reject in part the Report of Magistrate Judge Morgan, for the reasons that have been set forth above.

IT IS SO ORDERED.

Dated: Feb. 4, 1999.
Detroit, Michigan

/s/ Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District Court

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[18] *See supra* at 14 & n.15.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 97-CV-74551

Honorable Julian Abele Cook, Jr.

DETROIT TYPOGRAPHICAL UNION, LOCAL NO.18,
Plaintiff,

v.

DETROIT NEWSPAPER AGENCY,
d/b/a DETROIT NEWSPAPERS,
Defendant.

ORDER

On March 7, 2000, the Court ordered the parties to show cause as to why this case should not be closed. Each party responded in a timely manner and indicated that the prior orders of the Court had resolved all of the issues in this case.

Accordingly, the March 7, 2000 Order to Show Cause has been satisfied, and the Court will enter a judgment forthwith.

IT IS SO ORDERED:

Dated: Apr. 27, 2000
Detroit, Michigan

/s/ Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 97-CV-74551

Honorable Julian Abele Cook, Jr.

DETROIT TYPOGRAPHICAL UNION, LOCAL NO. 18,
Plaintiff,

v.

DETROIT NEWSPAPER AGENCY,
d/b/a DETROIT NEWSPAPERS,
Defendant.

JUDGMENT

This lawsuit is an action to compel the Defendant, Detroit Newspaper Agency, to arbitrate a grievance pursuant to a collective bargaining agreement. On March 3, 1998, the Court issued an order that (1) granted a motion by the Plaintiff, Detroit Typographical Union, No. 18, for the entry of a summary judgment, and (2) compelled the Defendant to arbitrate the grievance. Nonetheless, a dispute arose thereafter as to the means by which the claims were to be arbitrated, and on February 4, 1999, the Court entered an additional order that clarified the rights and responsibilities of each party. The case was stayed during the pendency of the arbitration.

On March 7, 2000, the Court ordered the parties to show cause as to why this case should not be closed. In response, the parties advised the Court that its prior adjudications had resolved all of the issues in this case. Therefore, a judgment is

entered in favor of the Plaintiff and against the Defendant on all claims in this case, in accordance with the earlier orders of the Court.

IT IS SO ORDERED.

Dated: Apr. 27, 2000
Detroit, Michigan

/s/ Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 00-CV-70580
Honorable Julian Abele Cook, Jr.

DETROIT NEWSPAPER AGENCY, d/b/a
DETROIT NEWS,

Plaintiff,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL NO. 18,

Defendant.

ORDER

This case arises out of the highly publicized labor dispute between the Plaintiff, Detroit Newspaper Agency ("Newspaper"), and the Defendant, Detroit Typographical Union, Local No. 18 ("Union"). After participating in a strike and demonstration, Gary Russnell, a member of the Union and former employee of the Newspaper, filed a grievance against the Newspaper for his alleged wrongful termination, which was ultimately heard and decided by Arbitrator Robert McCormick ("Arbitrator").

The parties have filed cross-motions in this Court, each seeking the entry of a summary judgment.[1] In its motion, the

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[1] The Newspaper initiated this series of motions with its request for the entry of a judgment pursuant to Federal Rule of Civil Procedure 56(a). The Union responded with a similar motion on the basis of Federal Rule of Civil Procedure 56(b). Each party then filed the appropriate responsive pleadings.

Newspaper asks the Court to vacate the arbitration award, which granted Russnell's request for his reinstatement with back pay and benefits. On the other hand, the Union asks the Court to confirm the now-challenged award.

On Thursday, May 25, 2000 the Court heard argument on the parties' respective motions. For the reasons that are set forth below, the Newspaper's motion is denied and the Union's motion is granted.

I.

After negotiations in 1995 between the Newspaper and the Union failed to produce a collective bargaining agreement, employees of the Newspaper initiated a strike, in which they complained that their employer had committed, and was committing, unfair labor practices against them. The National Labor Relations Board ("NLRB") and the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") issued consent orders which governed the conduct of the striking employees during the conflict. As part of those orders, the Union agreed that its members would not block the ingress or egress, or otherwise obstruct passage, to or from the Newspaper's facilities. The substance of the orders was subsequently published to the Union's members.

On August 30, 1996, the Union conducted a demonstration in front of the Detroit News Building for the purpose of generating publicity in support of its cause.[2] Russnell, a participant in the strike and the demonstration, had worked at the Newspaper without incident from the early 1970's until 1996 when he was terminated for his alleged involvement in blocking the ingress and egress to the Detroit News Building on August 30th.

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[2] Although factual questions surround the precise nature of the demonstration and the parties' actions there, these issues need not be addressed for the purposes of resolving the instant motions.

Thereafter, the Union filed a lawsuit in this Court to compel arbitration, maintaining, among other things, that the termination of Russnell's job was in violation of his employment guarantee, which had been negotiated between the Union and the Newspaper (through its predecessor, the Detroit Free Press) in 1975. In early 1998, the parties filed cross-motions for summary judgment. The Newspaper argued that Russnell's claims were not arbitrable because (1) the collective bargaining agreement with the Union had expired, and (2) his employment guarantee was ineffective during the pendency of the strike. In support of its position, the Union maintained that (1) the employment guarantee was in effect during the strike, and (2) the termination of an employee could only occur for certain enumerated reasons, including just cause.

After a hearing on the motions, the Court entered an order on March 3, 1998 that encompassed two holdings.[3] First, the Court concluded that the Union's grievance, which arose subsequent to the expiration of the collective bargaining agreement, pertained to claimed violations of properly vested rights or rights that had otherwise survived the parties' labor-management contract. Thus, the Court determined that the Union's grievance was of the type that is subject to arbitration. Second, the Court found that arbitration was the proper forum for the Newspaper's contention (to wit, that Russnell's job guarantee was interrupted at the time of his discharge), noting that to hold otherwise would require it to improperly decide the merits of the grievance.

In May and June of 1999, the parties arbitrated their claims as to Russnell. At the conclusion of the hearing, the Arbitrator concluded that Russnell (1) had submitted a claim that was arbitrable under the parties' collective bargaining agreement,

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[3] This order was applicable to Russnell, as well as to the other workers whose interests were represented by the Union in this lawsuit.

(2) was entitled to a just-cause determination concerning the termination of his employment, and (3) had been discharged without just cause. Notably, the Arbitrator found that "Russnell plainly did not, by himself, hinder any person's, or any potential person's, ingress or egress to or from the building." (Pl.'s Mot. Ex. 6 at 16.) Accordingly, the Arbitrator granted the grievance and provided for Russnell's reinstatement with retroactive pay and benefits for the period of his termination. This lawsuit followed.

II

According to Federal Rule of Civil Procedure 56(c), a motion for summary judgment shall only be granted if a party, through its pleadings and evidentiary submissions, "show[s] that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Here, the litigants are in agreement as to the salient facts. The question is whether either of them is entitled to the entry of a judgment as a matter of law. In weighing the merits of each motion, the Court is obliged to examine the pleadings and evidence in a light that is most favorable to the nonmoving party. Fed. R, Civ. P. 56(c); *see Eastman Kodak Co. v. Image Tech Servs, Inc.*, 504 U.S. 451, 456 (1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

More specifically, in order to decide whether either party is entitled to, a conformation or a vacation of an arbitration award, the Court must employ "one of the narrowest standards of judicial review in all of American Jurisprudence." *International Ass'n of Machinists and Aerospace Workers v. Tennessee Valley Auth.*, 155 F.3d 767, 771 (6th Cir.1998) (quoting *Lattimer-Stevens v. United Steelworkers of America*, 913 F.2d 1166, 1169 (6th Cir. 1990)) (internal quotation marks omitted). An arbitrator's decision is legitimate "so long as it draws its essence from the collective bargaining agreement." *Id.* (citing *United Steelworkers of America v. Enter-*

prise Wheel and Car Corp., 363 U.S. 593, 597 (1960). Thus, the Court may vacate the award only if and when an arbitrator manifests an infidelity to the contractually interpretive role. *Id.*

III.

The parties' respective motions present three issues, First, did the Arbitrator hold that the question of arbitrability had been waived, and thereby err so seriously that the award should be vacated? Second, did the Arbitrator commit a fundamental error when he decided that Russnell's grievance was arbitrable even though the terms of the collective bargaining agreement provided that his lifetime employment guarantee would be "interrupted" during the pendency of a strike? Third, is the arbitration award fatally defective since the Arbitrator concluded that he lacked the authority to decide whether Russnell violated the consent orders of the NLRB and the Sixth Circuit? For the following reasons, each of these questions is answered in the negative.

A

As a first point of error, the Newspaper argues that the Arbitrator incorrectly concluded that the issue of arbitrability had been waived. According to the Newspaper, this conclusion is untenable, in that the issue has been extensively litigated in this Court and was referred to arbitration for a decision. In its response, the Union contends that the Arbitrator is entitled to rely upon the identification of the issues in controversy and those that have been waived by the parties though their respective counsel. During the arbitration, the Newspaper advised the Arbitrator that the only issue for arbitration was whether Russnell's termination was premised upon just cause. Nevertheless, the Newspaper notes that the parties later orally submitted arguments relating to arbitrability to the Arbitrator.

The Arbitrator, in his written opinion, did not find that the issue of arbitrability had been waived. Rather, a straightforward reading of his decision suggests that he applied a variation of the doctrine of estoppel, which is a traditional principle of contract law. Specifically, the Arbitrator found that a fair reading of the record suggested the Newspaper considered itself to have been bound by the just-cause provision of the employment guarantee when it discharged Russnell. (Pl's Br. Ex. 6 at 14.) In support of his decision, he cited (1) a letter by the Newspaper which declared that those individuals, whose guarantees had been suspended during the strike, were entitled to return to work, (2) a letter stating that Russnell had been terminated for just cause as a result of his conduct during the August 30th demonstration, and (3) a statement by the Newspaper's Counsel that the sole issue for arbitration was whether there was just cause for the grievant's termination. As a result, the Newspaper was held to the terms of the just-cause clause.

Importantly, the Arbitrator did not fault the Newspaper for failing to raise its arguments prior to, or during, the arbitration. Instead, he apparently found that (1) the Newspaper's prior statements revealed something about the intent behind its decision to terminate Russnell, and (2) an employer should not be able to substantially shift its interpretation of the collective bargaining agreement in midstream to the detriment of the other contracting party. Here, the Arbitrator prevented the Newspaper from substantially proceeding upon the theory that the just-cause provision was applicable and then changing its position to the detriment of the Union. As such, he opined that the just-cause provision of the guarantees was effective and the claim was arbitrable.

In its motion, the Newspaper also contends that the Arbitrator failed to consider evidence in its favor that was in the record. Specifically, it argues that (1) its theory of

inarbitrability was raised during the arbitration hearing and (2) the letters, which had been relied upon by the Arbitrator, do not pertain to Russnell. Rather, it submits that all of the communications, which specifically pertained to Russnell, uniformly maintained that his claims were inarbitrable.

Although one reading of the evidence could support the position of the Newspaper as to whether it should be estopped from litigating the issue of inarbitrability, that is not the issue here. The Court is not a traditional appellate tribunal over the decisions by an arbitrator. Instead, the question before this Court is whether the Arbitrator so disregarded the terms of the contract and the surrounding facts that his decision is tantamount to his own brand of "industrial justice" because it does not draw its essence from the contract. *See Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

In this light, the Newspaper's argument is without merit. In applying a form of estoppel, the Arbitrator did not fail to heed the essence of the collective bargaining agreement, as argued by the Newspaper. Rather, he employed a traditional principle of contractual interpretation when the collective bargaining agreement was evaluated by him. Accordingly, the Court is legally bound to uphold the holding. As a result, the Newspaper's request is denied, and the Union is entitled to the entry of a summary judgment as a matter of law on this issue.

B

As a second point of error, the Newspaper contends that the Arbitrator erred finding that the just-cause provisions of the employment guarantee remained in force, even during the pendency of a strike. (Pl.'s Br. Ex. 6 at 15.) In support, the Newspaper points to contractual language that provides for an interruption of the guarantee during any strike.

The Arbitrator, in supporting his conclusion, looked to the textual structure of the guarantee. The provision at issue differentiated between circumstances that warranted the

guarantee's interruption and conditions that warranted its termination. *Id.* Citing to the decision of another arbitrator concerning the same provision, the Arbitrator concluded that the most reasonable construction of the textual difference was that protected workers have "no right to claim five days work during the term of the work stoppage, but . . . the temporary suspension of [their] lifetime guarantee[s are] reinstated when the strike is ended." (Pl's Br. Ex. 6 at 16.) Thus, the benefits, compensation, and other rights ancillary to employment that ordinarily might apply under the guarantee are suspended during a strike, but the preservation of the basic employment relationship can only be ceased for reasons such as a termination for just cause.

The Newspaper contends that this reading would have the practical effect of negating the clause within the collective bargaining agreement which provides that the lifetime guarantees "shall be interrupted for the following reasons, for the duration of the incident, and reinstated at its conclusion: (1) strike or lockout . . . ." (Pl.'s Br. Ex. 3 at 1.) It argues that by finding that some degree of protection remained during the strike, the Arbitrator delivered his own brand of "Industrial justice." This objection cannot be sustained under the appropriate standard of review.

The question here is whether the Arbitrator forsook his duty to interpret the terms of the collective bargaining agreement. It is apparent from the decision that the Arbitrator employed permissible tools of contractual interpretation when he read the contract as a whole and construed the particular clause at issue as giving the Newspaper some protection; namely, that it was not required to provide certain compensation or benefits during the pendency of a strike. The Newspaper's contention that the Arbitrator "essentially wrote the critical 'strike and lockout' language out of the agreement" is without merit. (Pl.'s Br. at 9). According to the Arbitrator's interpretation, this clause embodies a com-

promise position under which the Newspaper is protected from paying labor costs for guaranteed workers who strike while the strikers have the assurance that, absent just cause of other specified reason, they can return to their guarantees upon their return to work. Upon a review of the record, there is no reason to conclude that the Arbitrator disregarded his contractually interpretive duties when he enforced this compromise position.[4]

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[4] The Newspaper has cited *International Blvd. of Elec. Workers v. Thomas & Betts Corp.*, 182 F.3d 469 (6th Cir.1999), for the proposition that an arbitrator may not ignore a contractual provision merely because it produces a harsh result—a proposition that the Newspaper deems to be relevant here. The case is clearly inapposite.

In *Electrical Workers*, the plaintiff was directly and explicitly made aware of the terms of the collective bargaining agreement which required him to see one of an enumerated group of doctors and provide written authorization for his medical absences. *See id.* at 470. However, he chose to see an unlisted doctor in violation of the agreement and failed to submit adequate documentation to justify his absences. The plaintiff was reminded of his contractual obligations in a personal meeting with the industrial relations manager, and "[t]he arbitrator found that Allman was on notice that the Company was demanding strict compliance with medical excuse reporting requirements regarding absences," *Id.* Nonetheless, the plaintiff again transgressed these requirements when he failed too notify his employer that he would undergo surgery and take time off from work. As a result, he was terminated. *See id.* The arbitrator held that the termination was excessively harsh given the circumstances of the plaintiff's absence. *Id.* However, the Sixth Circuit reversed a confirmation of the award because the arbitrator had implied an unwritten provision (to wit, one precluding the employer from unreasonably refusing to excuse an undocumented absence), *id.* at 472. Such a unilateral rewriting of the contract is impermissible.

By contrast here, the Arbitrator neither implied nor ignored any contractual terms. Rather, it was his view that the most reasonable construction of the terms of the parties' contract, when viewed in its entirety, was that the interruption clause preserved the employee's long-term guarantee but undermines any present claims for compensation or benefits during the course of a strike. The decision was not based on the harshness

It is irrelevant at this stage in the proceedings as to whether the Court would find the Newspaper's arguments to be persuasive in the first instance. The Newspaper is not entitled to relitigate its claims simply because it believes that the Arbitrator came to the wrong conclusion. Although "[t]he arbitrator may not ignore the plain language of the contract[,] the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *United Paperworkers Internat'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (citing *Enterprise Wheel and Car Corp.*, 363 U.S. at 599). Hence, the Newspaper's voluminous arguments that its interpretation of the contractual terms is the best one are, at best, tangential. It is evident to this Court that the Arbitrator neither exceeded his contractually interpretive role nor dispensed his own brand of justice. Hence, the Newspaper, is not entitled to the entry of a judgment on this issue, Instead, a summary judgment will enter in favor of the Union, confirming the Arbitrator's decision inasmuch as he adjudicated the issue of arbitrability.

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of the result, but rather upon a holistic reading of the contract. Although the Arbitrator noted that an adoption of the Newspaper's argument might produce an absurd result (to wit, that the guarantee was meaningless because the employer could simply engage in a lockout and then terminate the guaranteed employees), he did not characterize the result as harsh, but rather as less reasonable than other interpretations. Hence, the Newspaper's assertion that "the Arbitrator believed that the deal struck by the [U]nion. could produce a potentially harsh result in the event of a lockout [and therefore] ignored that provision" (Pl.'s Br. at 11), is unsupportable. It is clear from the text that the Arbitrator applied traditional principles of contractual interpretation to the provision at issue. Whether the Newspaper and the Court agree with the Arbitrator's conclusion is irrelevant to the presently pending motions for summary judgment.

C

The final claim of error by the Newspaper concerns whether Russnell was terminated for just cause. The Newspaper asserts that the Arbitrator improperly refused to consider whether Russnell's alleged misconduct violated the consent orders of the NLRB and Sixth Circuit. Since those orders embodied agreements by the parties, the Newspaper submits that it was justified in relying on them as establishing a code of conduct in connection with the employment guarantee. The Union responds that the Arbitrator (1) was limited in his role as interpreter of the contract, and as such, he was without any authority to address the orders of the NLRB and the Sixth Circuit, (2) retained the authority to determine the scope of his own authority under the terms of the contract, and (3) specifically found that Russnell did not obstruct the entrance to the Newspaper's facility, as has been alleged. Moreover, the Union maintains that the NLRB and Sixth Circuit did not conclude that Russnell had committed any wrongdoing.

Although the Court concurs with most of the Union's arguments on this issue,[5] the Newspaper has submitted one

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[5] It is well settled that an arbitrator has the authority to determine the extent of his or her own interpretive powers. *See W R. Grace & Co. v. Local Union 759, Internat'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 765 (1983) ("Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of an arbitrator's authority is itself a question of contractual interpretation that the parties have delegated to the arbitrator."). Those powers are constrained only by the terms of the contract To the extent that the Arbitrator correctly looked to the original contract and did not find the authority to interpret or enforce the orders of the NLRB and the Sixth Circuit, there is no evidence that this determination fails to draw its essence from the contract.

The case cited by the Newspaper, *Mountaineer Gas Co, v. Oil Chem, & Atomic Workers Internat'l Union*, 76 F.3d 606 (4th Cir.1996), is not supportive of its position in this controversy. In *Mountaineer Gas*, the

reasonable claim of error. The Newspaper has presented an innovative argument, in which it contends that the consent orders at issue were, in reality, settlement agreements relating to a labor dispute. According to the Newspaper, these "settlement agreements" superceded the challenged collective bargaining agreement in reference to the specific circumstances at issue. To support this argument, the Newspaper has drawn an analogy between the consent orders and last chance agreements (i.e., agreements that give an employee one last chance to correct unacceptable behavior prior to termination or other adverse employment action), "'[L]ast chance agreements constitute formal contractual settlements of labor disputes. Since LCAs follow collective bargaining agreements, they should be construed as superceding a CBA in certain circumstances because an LCA reflects the parties' own construction of the CBA." *International Union of Operating Eng'rs v. Cooper Natural Resources, Inc.*, 163 F.3d 916, 919 (5th Cir.1999) (citing *Bakers Union v. ITT Continental Baking Co.*, 749 F.2d 350, 356 (6th Cir.1984)).[6] Accordingly, where an arbitrator ignores a last chance agreement, the arbitration award is generally vacatable. *Id.*

In the present case, it is undisputed that the consent orders (1) followed the collective bargaining agreement and (2) were achieved by a stipulation of the parties in resolution of the general labor dispute at issue. Hence, there is a legitimate

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court held that an arbitrator reversibly erred when he refused to apply a facially valid company drug policy because he disregarded a contractual provision that gave the company complete authority to determine general policy. The arbitrator did not interpret the policy-making authority provision under the contract, The record indicates that he ignored it. By contrast here, the Arbitrator did not ignore any provision in the original collective bargaining agreement. Instead, he interpreted the provisions on the whole. This was not error as such, except to the extent discussed in the text above.

[6] *Bakers Union* remains good law in the Sixth Circuit. *See Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 787 (6th Cir.1991).

argument that these orders were superceding agreements as to, among other things, the meaning of the original contract's "just cause" language. Furthermore, the substance of the consent orders was published to the employees. In such case, the Arbitrator might have committed an error in refusing to consider the orders.[7]

Even so, this Court does not have the authority to vacate an arbitration award merely because it believes that an error has been committed. Rather, an error is only a ground for vacating the award if it manifests infidelity to the Arbitrator's duties—to wit, if the error is "in bad faith or so gross as to amount to affirmative misconduct." *Misco, Inc.*, 484 U.S. at 40. In the present case, from the face of the arbitration award it is evident that even if the Newspaper's claim of error is accepted, the error is harmless. The binding factual findings of the Arbitrator show that the Newspaper would be unable to obtain a different outcome even if the alleged error is corrected. Therefore, it is not a ground for a vacation of the award.

In July of 1996, the NLRB entered an order on the basis of the stipulation of the parties. (Pl.'s Ex. 1 at 2.) The order provided, in part, that striking employees would not "[b]lock[] or otherwise coercively interfer[e] with ingress or egress at the places of business or facilities of [the Newspaper] . . . ." (Pl.'s Ex. 1 at 3.) On August 16,1996, the Sixth Circuit summarily mandated the enforcement of the order of the NLRB. The Newspaper relied solely upon this prohibition when it fired Russnell, alleging that he blocked the doors to the Detroit News Building during the August 30th demonstration.

In the arbitration opinion, the Arbitrator stated clearly, "[t]he facts reveal that on August 30, 1996, Mr. Russnell sat

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[7] It appears from the record that the analogy to last chance agreements was not presented to the Arbitrator.

on the sidewalk adjacent to the steps leading to the Detroit News [B]uilding. Mr. Russnell plainly did not, by himself, hinder any person's, or any potential person's, ingress of egress to or from the building." (Pl.'s Br. Ex. 6 at 16.) The Arbitrator also noted that Russnell promptly moved when instructed to do so by the police and was not, unlike others, seated on the steps or ramps so as to possibly impede someone's entry into the building. *Id.* In short, as a matter of fact, the Arbitrator found that Russnell did not obstruct or interfere with the Newspaper's entryway. As such, it cannot be legitimately argued that he violated the terms of the consent orders. At most, the Arbitrator's decision to refrain from considering whether, or expressly stating that, Russnell did not violate the orders involved something akin to harmless error. *See also Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 527 (6th Cir.1993) (error is harmless, and thus not reversible, where excluded evidence would not alter the outcome of a labor proceeding); *United Steelworkers of America v, Caster Mold & Machine Co.*, 345 F.2d 429, 430-31 (6th Cir.1965) (refusing to reverse error in labor law trial where disputed exhibit was not germane to legally tenable conclusion). No genuine issue of a material fact is present. The Newspaper's motion for summary judgment on the issue is denied, and the Union's motion is granted.

D

In its motion for summary judgment, the Union has suggested that the Newspaper's lawsuit and present arguments are so lacking in merit that its counsel should be sanctioned pursuant to Federal Rule of Civil Procedure 11.[8]

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[8] According to Rule 11(b), where, as here, an attorney presents a signed pleading or motion to the Court, the attorney certifies that "that the pleading, motion or other paper is not brought for an improper purpose; the claims or defenses are warranted by existing law, or a nonfrivolous argument for the extension, modification, reversal or adoption of law; and the factual allegations or denials have or are likely to have evidentiary

Although the Union has not filed a separate request for sanctions, as required by Rule 11(c)(1), the Court has the authority to initiate an order to the parties to show cause why sanctions should not issue if it believes that a violation of the Rule has occurred. Fed. R. Civ. P. 11(c)(2).

Despite the lack of merit in the Newspaper's claims, the Court will refrain from any inquiry into the possibility of sanctions at the present time. Hence, the Union's informal request for the imposition of sanctions will be denied without prejudice. However, since this case is a group grievance, it is worthwhile to note that the parties are hereby put on notice that the Court will revisit the issue of sanctions if the parties present substantially the same arguments with respect to the awards of the other grievants in the group.

IV

In conclusion, the Newspaper's motion is denied, and the Union's motion is granted as to each issue for the reasons that have been set forth above.

IT IS SO ORDERED.

/s/ Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District Court

Dated: June 13, 2000
Detroit, Michigan

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support." *Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 980 (6th Cir.1999). If such certification is false, sanctions may apply. *See id.*

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 00-CV-70580
Honorable Julian Abele Cook, Jr.

DETROIT NEWSPAPER AGENCY, d/b/a
DETROIT NEWSPAPERS,
Plaintiff,

v.

DETROIT TYPOGRAPHICAL UNION LOCAL NO. 18,
Defendant.

JUDGMENT

On June 13, 2000, the Court granted a motion for the entry of a summary judgment on all claims in favor of the Defendant, Detroit Typographical Union No. 18 ("Union"), who has sought a confirmation of a certain arbitration award.

Accordingly, a judgment is entered in favor of the Union and against the Plaintiff, Detroit Newspaper Agency, on all claims.

IT IS SO ORDERED.

Dated: June 15, 2000.
Detroit Michigan

/s/ Honorable Julian Abele Cook, Jr.
HONORABLE JULIAN ABELE COOK, JR.
United States District Court

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case number 00-CV-70580
Honorable Julian Abele Cook, Jr

DETROIT NEWSPAPER AGENCY, d/b/a
DETROIT NEWSPAPERS,
Plaintiff,

v.

DETROIT TYPOGRAPHICAL UNION,
LOCAL NO. 18,
Defendant.

ORDER

This case involves a dispute over an arbitration award that was rendered by Robert McCormick ("Arbitrator") in favor of a grievant, Gary Rusnell. This grievance arose when Rusnell was terminated following his participation in a labor strike that was conducted by the Defendant, Detroit Typographical Union, Local No, 18 ("Union"), against the Plaintiff, the Detroit Newspaper Agency ("Newspaper").

There are two motions now pending before this Court, both of which have been filed by the Newspaper. In its first motion,[1] the Newspaper asks the Court to reconsider its Order Judgment of June 13, 2000. The challenged Order (1) denied the Newspaper's request to vacate the Arbitrator's award to

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[1] The instant motion was filed on June 22, 2000.

Rusnell, and (2) granted the Union's motion for the entry of a summary judgment which confirmed McCormick's decision. The Newspaper contends that the Court (1) committed a palpable error when it determined that a provision within the parties' collective bargaining agreement required this dispute to be submitted to arbitration, (2) lacked jurisdiction to enforce the award because the parties' collective bargaining agreement did not provide for any arbitration of the grievance at issue, and (3) committed palpable error by enforcing an award of reinstatement, since the same is barred by the Norris-LaGuardia Act and traditional principles of contract law.

On June 23, 2000, the Newspaper filed a motion, in which it requested the Court to stay the execution of its judgment pending the resolution of its motion for reconsideration and its intended appeal of this case.

For the reasons that have been set forth below, the motion for reconsideration is denied, and the motion for a stay of execution is granted in part and denied in part.

I

A

In reviewing requests for the reconsideration of a prior ruling, this Court is guided by its Local Rules which provide, in part,

> that the [C]ourt will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the [C]ourt, either expressly or by reasonable implication. The movant shall not only demonstrate a palpable defect by which the [C]ourt and

> the parties have been misled but also show that a different disposition of the case at result from a correction thereof.

E.D. Mch. LR 7.1(g)(3).[2] These Local Rules do not confer procedural rights upon the litigants. Rather, they are judicial rules of self-governance that are designed to aid the district courts in handling the docket in an effective and efficient manner. *See Valassis Communications, Inc. v. Aetna Cas. & Sur. Co.*, 97 F.3d 870, 873 (6th Cir. 1996) (citing *United States v. Kingston*, 922 F.2d 1234 (6th Cir. 1990)).

B

The Newspaper's first basis for reconsideration is grounded upon the following declaration. "[T]he clear language of the job guarantee provides that during the period of the strike Rusnell had no job." (PL's Br. Recons. at 2.) This argument is essentially the same position that was previously advanced by the Newspaper and ruled upon by the Court. In an earlier motion, the Newspaper contended, *inter alia*, that (1) Rusnell's employment guarantee was invalid during the pendency of a strike and (2) the Arbitrator erred in finding that Rusnell's grievance was arbitrable. (*See* PL's Br. Summ. J. Ex. 6 at 15 and accompanying text.)

Here, the Newspaper's presentation of a different authority in the present argument is not a sufficient basis to reconsider the challenged Order under our Local Rules. In its supporting brief, the Newspaper cites *H. K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970), which held that a court cannot compel employers and unions to reach an agreement or to adopt a provision therein. Thus, the movant submits that this court erred, and ran counter to *H.K. Porter*, by effectively compelling it to

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[2] A defect is palpable if it is "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct [or] manifest." *Black's Law Dictionary* 1110 (6th ed. 1990).

adopt an arbitration provision were none existed in the contract. The Newspaper also made reference to an earlier comment by the Court that the Arbitrator's interpretation of the parties' contract was in accord with what one would expect is a contract; namely, a compromise position between the parties' interests.

However, the Court did not find, and does not now conclude, that the Arbitrator inserted any new compromise or provision into the parties' agreement. Rather, the comment by the Court was inherently tied to its determination that McCormick did not forsake his contractually interpretive role as an arbitrator. According to the Order, the Arbitrator used traditional principles of contract law to interpret the terms and conditions within the various contracts that had been presented to him by the parties. Hence, the holding of *H. K. Porter*, 397 U.S. 99, is inapposite to the issue in this case, and, therefore, the Newspaper's first request for reconsideration is denied.

C

The Newspaper also asserts that the Court lacks jurisdiction[3] to enforce the Arbitrator's award under Section 301 of the Labor-Management Relations Act because the collective bargaining agreement between the parties does not permit arbitration of this grievance. Specifically, it charges that (1) Rusnell's job guarantee does not contain an arbitration provision and (2) the collective bargaining agreement, which includes such a provision, expired before Rusnell was terminated.

The latter contentions, which form the basis of the instant jurisdictional argument, had been impliedly referenced in the

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[3] Issues of subject matter jurisdiction "may be raised at any time, by any party or even sua sponte by the [C]ourt itself." *Franzel v. Kerr Mfg. Co.*, 95 F.2d 628, 630 (6th Cir. 1992).

challenged Order and were expressly addressed in the Order of May 3, 1998. In the latter Order, the Court found that the Union's claim pertained to alleged violations of properly vested rights or rights that had otherwise survived the parties' labor—management contract. Hence, the Newspaper was not entitled to avoid the arbitration of Rusnell's grievance. In the presently challenged Order, the Court explicitly discussed the above-referenced portion of the May 3d Order. (Order of June 13, 2000 at 3.) The Newspaper does not present any new argument or authority to support its position. Accordingly, its second request for relief is duplicative and is denied

D

The Newspaper's final argument in favor of reconsideration is that "the remedy available to . . . job guarantee holders [is] limited to money damages and . . . injunctive relief ordering reinstatement [is] prohibited by the Norris-LaGuardia Act." (PL's Br. Recons. at 5 (discussing *Heheman v. E. W. Scripps Co.*, 661 F. 2d 1115, 1124 (6th Cir.1981))). The movant presents two variations on this theory.

First, it is contended that, pursuant to *Heheman*, 661 F.2d 1115, the Court lacks the power to issue an injunction which would require a party to specifically perform an employment guarantee. However, the *Heheman* court expressly recognized, as an exception to the rule, that the federal courts are empowered to order specific performance of grievance arbitration clauses against management. *Id.* at 1124 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

Here, the Court did not issue any injunctive order that compelled the Newspaper to reinstate Rusnell. Rather, it enforced an arbitration clause, as permitted by *Heheman*, and subsequently upheld the Arbitrator's award of reinstatement. The United States Court of Appeals for the Sixth Circuit has indicated that a court may order an employer to comply with

an arbitration award that includes reinstatement with back-pay. *See Milk & Ice Cream Drivers and Dairy Employees Union v. Gillespie Milk Prods. Corp.*, 203 F.2d 650 (6th Cir.1953) (reversing dismissal of complaint, which was premised upon unavailability of requested relief); *see generally A. L. Kornman Co. v. Amalgamted Clothing Workers of America*, 264 F.2d 733, 737 (6th Cir.1959) ("If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards.").

Second, the Newspaper argues that "traditional contract principles prohibit an order requiring the reinstatement of Rusnell." Specifically, the Newspaper cites *Heheman*, 661 F.2d 1115, for the proposition that a "grant of specific performance [of an employment guarantee is barred by] traditional principles of contract law." *Id.* at 1125. On this basis, the movant contends that the Arbitrator lacked the authority to award reinstatement to Rusnell.

The role of a court with respect to an arbitration award is a limited one. On the one hand, it is empowered to determine whether an arbitrator had authority to grant the award in question. *Bricklayers, Masons, Marble & Tilesetters Protective & Benevolent Union v. Leuder Constr. Co.*, 346 F. Supp. 558, 562 (D. Neb. 1972) (citing *United Steelworkers of America v. Enrerprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). On the other hand, its authority to reject an arbitration award is exceptionally narrow. *See Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1169 (6th Cir. 1990); *see also Arco-Polymers, Inc. v. Oil, Chemical & Atomic Workers Internat'l Union*, 671 F.2d 752, 757 (3d Cir.1982) ("[If] it is possible that the arbitrator could have been interpreting the contract, his failure to apply correct contract principles is irrelevant; the arbitrator's contract interpretation must be irrational before a reviewing

court may disturb the award because it is 'totally unsupported by principles of contract construction.'").

Decisions from reported cases indicate, whether implicitly or explicitly, that it is proper for the federal courts to confirm arbitration awards of reinstatement. *See Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1205 (10th Cir. 1999) (affirming award of reinstatement as not contrary to public policy); *Tennessee Valley Auth. v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999) (reversing trial court's refusal to confirm arbitrator's award of reinstatement; rejecting contention that reinstatement violates public policy); *Monroe Auto Equip. Co. v. United Automotive, Aerospace & Agricultural Implement Workers of America*, 981 F.2d 261 (6th Cir. 1992) (upholding arbitration award of reinstatement). Hence, under the limited standard of review that applies to the instant cause and contrary to the Newspaper's argument, the Court did not commit a palpable error when it affirmed the Arbitrator's award.[4] Therefore, the Newspaper's third, and final, basis for reconsideration must be, and is, rejected.

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[4] Moreover, the Newspaper has neither alleged nor shown that the principles of *Heheman* would compel the same denial of reinstatement here. 661 F.2d at 1125 ("First, an award of damages can adequately compensate plaintiffs . . . . Second, a grant of specific performance could require the courts to supervise the employer/employee relationship over the length of plaintiffs' lifetime, a task for which the courts are poorly suited. Third, because there is not enough printing work to occupy both the Enquirer's printers and plaintiffs, a grant of specific performance would lead to considerable waste.") It is not clear that money damages would be adequate in this case. No mention has been made about whether Rusnell is subject to potential promotions or transfers that would affect his salary. Moreover, there has not been any showing that the supervision of Rusnell's reinstatement would be unreasonably difficult for the Court to undertake. Accordingly, on the merits, the Newspaper's position must be denied.

E

For the reasons that have been set forth above, the Newspaper's motion for reconsideration of the Order of June 13, 2000 is denied.

II

The Court now the Newspaper's motion for a stay of execution of the challenged Order and Judgment. This request was based upon the pendency of the Newspaper's motion for reconsideration and its announced intention to file an appeal with the Sixth Circuit Court of Appeals. Given the present disposition of the Newspaper's application for reconsideration, its prayer for a stay of execution pending the resolution of the motion by this Court is denied for reasons of mootness. Thus, the sole remaining question is whether a stay should be issued pending appeal.

In an earlier decision, the Court confirmed an arbitration award of reinstatement with back-pay and benefits to Rusnell. This kind of award has an injunctive, as well as a legal component. *See Dewey v. Reynolds Metal Co.*, 304 F. Supp. 1116 (W.D. Mich. 1969), *rev'd on other grounds* 429 F.2d 324. Significantly, the Union does not oppose a stay of the legal component of the award which called upon the Newspaper to pay retroactive wages and benefits to Rusnell. Accordingly, the Newspaper's request for a stay of the damage award is granted.

The Newspaper contends that the arbitration award is legally defective because, *inter alia*, (1) a reinstatement directive is not an appropriate form of relief and (2) money damages should suffice. However, this Court has already reaffirmed its decision as to the appropriates of Rusnell's reinstatement, and the Newspaper's argument was found to lack merit. Instead, the Judgment, which confirmed an award of reinstatement, provides a form of injunctive relief.

As to the issue relating to the inclusion of the injunctive element within the Judgment, the Court has broad discretion whether to allow a stay. Fed. R. Civ. P. 62(c); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil 2d § 2904, at 501 (1995). In making its decision, the Court is called upon to determine "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The burden is on the movant to prove that the balance lies in its favor. "Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied" 11 Wright, Miller & Kane, *supra*, § 2904, at 503-05.

Here, the balance of these factors does not weigh in favor of granting a stay. First, the Newspaper has not demonstrated any compelling likelihood it will succeed on the merits of its appeal. Instead, it merely presents the same arguments that have already been litigated. Moreover, the legal authorities, upon which the Newspaper relies, do not support its positions for the reasons that have been set forth in the several orders of this Court.

Second, the applicant will not suffer significant irreparable injury if its request for a stay is denied. The Newspaper argues that, if it prevails on appeal, there will be no way (1) to undo Rusnell's intermittent employment and (2) to prevent him from committing misconduct or disrupting the work-place. Contrary to the Newspaper's assertion, the record in this case reveals that Rusnell did not commit any employment misconduct during more than two decades of service to his employer. Rusnell's employment record only contains commendations. In fact, the Arbitrator found that Rusnell did

not commit any acts of misconduct during the events that led to this lawsuit. More specifically, there is no evidence that he will disrupt the workplace. Moreover, the court has not been provided with an explanation as to why money damages would be insufficient to compensate the Newspaper for any particular injustice that it may suffer.

Third, the entry of a stay would prolong Rusnell's separation from his gainful work. It has been argued with some convincing force that, on the facts of this case, Rusnell is less financially able to forego his employment than the Newspaper is able to allow him to return. This consideration weighs in the Union's favor. Moreover, in light of the discussion in the preceding paragraphs, this Court finds that the further extension of Rusnell's separation would, in all likelihood be unnecessary.

Fourth, although the Newspaper correctly argues that the public has a significant interest in upholding settlement agreements in labor disputes, there is nothing to indicate that the Arbitrator failed to uphold the parties' settlement agreement. The relevant part of the parties' agreement prohibited the Union's members from obstructing the ingress and egress to the Newspaper's buildings. In his decision, the Arbitrator included a factual finding that Rusnell did not inhibit others from entering or leaving the building at issue. Moreover, an additional public interest lies in enforcing collective bargaining agreements and ensuring the peaceful resolution of any conflicts that might arise. In the course of this lawsuit, it has been determinded that Rusnell's grievance was arbitrable under the parties' collective bargaining agreement. A grant of the stay would operate to stall the enforcement of the agreement and, perhaps more importantly, it would tend to erode the workers' confidence in utilizing the peaceful method of binding arbitration to swiftly and fairly resolve labor matters. Accordingly, the issuance of a stay of

the grant of injunctive relief is not significantly in the public's interest.

In summary, the balance of these four factors, in light of the record in this case, is clearly against the Newspaper. As such, its request for a stay of the injunctive portion of the Judgment, which confirmed the Arbitrator's award of reinstatement to Rusnell, is denied.

IT IS SO ORDERED.

Dated: Aug. 31, 2000
Detroit, Michigan

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
United States District Judge

APPENDIX I

Section 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such

agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of sub-

section (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B)

shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport

any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of

the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated

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[1] So in original. Probably should be "unenforceable".

process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

(July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542 to 545; July 26, 1974, Pub.L. 93-360, § 1(c)-(e), 88 Stat. 395, 396.)

APPENDIX J

AGREEMENT

between the

DETROIT NEWSPAPER AGENCY

and the

DETROIT TYPOGRAPHICAL UNION NO. 18

(CWA 14503)

In Effect from May 1, 1992
To and including April 30, 1995

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THIS AGREEMENT made and entered into this 1st day of May, 1992, by and between the Detroit Newspaper Agency, or its successor, through its authorized representatives, the parties of the first part (hereinafter sometimes referred to as the "Agency"), and Detroit Typographical Union No. 18 / CWA 14503, by its officers or a committee duly authorized to act in its behalf, the party of the second part (hereinafter sometimes referred to as the "Union"), shall be effective beginning with the date of execution hereof and ending April 30, 1995. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number shall each be deemed to include the others wherever the context so includes.

SECTION 1. *Union security clause*

The Agency recognizes the Union as the exclusive bargaining representative of all employees covered by this Agreement The words "employee" and "employees" when used in this Agreement apply to journeymen and apprentices.

Membership or non-membership in a labor organization shall not be a factor in the hiring of any employee or in the tenure or any condition of his employment or advancement therein.

A. All present employees who are members of the Union on the effective date of the Agreement shall remain members of the Union in good standing as a condition of continued employment. All present employees who are not members of the Union, and all employees who are hired hereafter, shall on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective or execution date of this Agreement, whichever is the later, shall become and remain members in good standing of the Union as a condition of employment.

B. Any employee who fails to comply with subsection (a) shall, upon formal notice from the Union, be discharged.

C. If any member shall lose good standing by falling one (1) month in arrears in union dues or assessments, uniformly required as a condition of retaining membership, the Employer shall, upon formal notice from the Union, discharge said employee.

D. The Union agrees that it will admit to membership and retain in membership any employee qualified according to the Laws of the Printing, Publishing and Media Workers Sector of the Communications Workers of America.

E. Discharges under this article shall not be subject to review under the grievance procedures of this Agreement.

F. Subject to the provisions of this Union Security Clause, the Union agrees that it will not require the Employer to discharge any employee pursuant to the Union Security provisions of this Agreement under circumstances which make the discharge, if put into effect, a violation of the National Labor Relations Act.

SECTION 2. *Change in contract*

If either party wishes to propose a change in wages, hours or any of the conditions in this Agreement, to take affect after April 30, 1995, it shall notify the other party to this Agreement in writing not less than sixty (60) days prior to the expiration of this Agreement.

SECTION 3. *Journeyman defined*

A. All work within the jurisdiction of the Union as recognized in Section 6 of this Agreement shall be performed only by journeymen and apprentices. Apprentices may be employed only in accordance with the ratio of apprentices to journeymen provided in Section 42(c) of this Agreement.

Additionally, employees hired in accordance with the provisions of Section 5C may work in the Pre-Press departments.

B. A journeyman is defined as:

1. A person who prior to the effective date hereof worked as such in the composing rooms of the party signatory to this Agreement.

2. A person who has completed apprentice training under the provisions of this Agreement or who has completed similar training elsewhere, or who has passed a qualifying examination under other procedures recognized by the Union or the Agency, or

3. A person who has had a minimum of four (4) years' experience at the trade; the foreman may accept as

sufficient proof of such experience at the trade a CWA/ITU journeyman membership card; the foreman may, in conjunction with a designated representative of the Union employed in the composing room, accept such other evidence of experience as these two deem adequate; if they are in doubt about the applicant's claim of four (4) years' experience at the trade, they may give the applicant an immediate test in the composing room in the classification of work for which the applicant has applied for, or

4. Any other person seeking to qualify as a journeyman shall be given an examination under nondiscriminatory standards and procedures established by the parties hereto (or the Joint Standing Committee) by impartial examiners qualified to judge journeyman competency selected by the parties hereto or the Joint Standing Committee. In the event agreement cannot be reached on the standards or procedures to be followed or the examiners to conduct such an examination, the dispute shall be submitted to the head of the Detroit office of the Bureau of Apprenticeship, U.S. Department of Labor, whose decision shall be final and binding on the parties. In hiring new journeymen the foreman may not exclude as candidates for employment any individuals who have established competency as journeymen but must recognize the priority of any journeyman who has been employed previously in the composing room.

C. It is understood that the experience and test referred to herein is designed only to establish the applicant's status as a journeyman and his eligibility to be hired, and does not affect the right of the foreman to discharge him for incompetency

D. The priority standing of all journeymen employed as of the execution date of this Agreement shall be merged by priority dates as recorded on the respective priority lists of The Detroit News and Detroit Free Press chapels as of

November 27, 1989. Journeymen employed after the execution date of this Agreement shall establish priority at the time they qualify under this section and make themselves available for work.

SECTION 4. *Slipboard*

A slipboard shall be maintained for the purpose of listing priority status.

SECTION 5. *Scale of wages*

A. The scale of wages for all journeymen from May 1, 1992 to and including April 30, 1995, shall be as follows:

	Per Hour	Per Shift	Per Week
Day.....	$16.7586	$125.69	$628.43
N. Night.....	$17.4593	$126.58	$632.91
Lobster.....	$18.8562	$127.32	$636.58

B. Effective May 1, 1992, all active full-time employees receive $1,200.00 pro-rated for part-time; effective May 1, 1993, receive $1,000.00, pro-rated for part-time; effective May 1, 1994, receive $1,000.00. pro-rated for part-time, plus $1.00 per shift for benefit plans, maximum of 260 shifts.

C. The minimum scale of wages to be paid apprentices shall bear the following proportions in the full scale of the shift on which they are employed:

First year, 65%	Second year, 72%
Third year, 80%	Fourth year, 88%

Part-Time Employees

The company may hire part-time employees to work in the Pre-Press departments.

Part-time employees will work a full shift.

Part-time employees will be paid the following minimum rates:

New hires at—
50% of the journeyman standard rate.
After 6 months of accumulated service—
60% of the journeymen standard rate.
After 1 year of accumulated service—
70% of the journeymen standard rate.
After 18 months of accumulated service—
80% of the journeymen standard rate.
After 2 years of accumulated service—
90% of the journeymen standard rate.

110 shifts worked in a category will move the employee to the next salary level.

Part-time employees shall be members of the Union.

Regular part-time employees scheduled to work 20 hours a week or more will be eligible for benefits as provided to other members of the bargaining units.

Consumer Price Index
(FROZEN FOR TERM OF CONTRACT)

D. If the Consumer Price Index for December 1984, exceeds the Consumer Price Index for December, 1983, by seven percent (7%) but not more than eleven percent (11%), a cost-of-living adjustment shall be added (retro-actively) to the weekly wage scale, effective December 1, 1984, for all employees covered by this Agreement. The cost-of-living adjustment shall be equal to the change in the Consumer Price Index in December, 1984, over December 1983, in excess of seven percent (7%), but not more than eleven percent (11%), multiplied by the average weekly wage bases provided in this Agreement.

If the Consumer Price Index for December, 1985, exceeds the Consumer Price Index for December, 1984, by Six and

One-Half Percent (6 1/2%) but not more than eleven (11%), a cost-of-living adjustment shall be added, (retroactively) to the weekly wage scale, effective December 1, 1985, for all employees covered by this Agreement. The cost-of-living adjustment shall be equal to the change in the Consumer Price Index for December 1985, over December 1984, in excess of Six and One-Half Percent (6 1/4%), but not more than Eleven Percent (11%), multiplied by the average weekly wage base.

If the Consumer Price Index for December, 1986, exceeds the Consumer Price Index for December, 1985, by Six and One-Half Percent (6 1/4%) but not more than Eleven Percent (11%), a cost-of-living adjustment shall be added (retroactively) to the weekly wage scale, effective December 1,1986, for all employees covered by this Agreement The cost-of-living adjustment shall be equal to the change in the Consumer Price Index for December, 1986, over December, 1985, in excess of Six and One-Half Percent (6 1/2 %), but not more than Eleven Percent (11 %), multiplied by the average weekly wage base.

For purposes of this Section:

Consumer Price Index refers to the Consumer Price Index for All Urban Consumers (CPI-U) United States city average (1967=100) published by the Bureau of Labor Statistics, U.S. Department of Labor.

The average weekly wage base refers to the weighted average of the contractual weekly wage (day scale) of all the employees of the Publisher covered by labor agreements except Electricians, Plumbers and Carpenters. Change in the Consumer Price Index refers to the percent increase in the Consumer Price Index measured over a twelve month period from December to December, and calculated to the nearest one-one hundredth (1/100th) of a percent.

No subsequent adjustments, retroactive or otherwise, shall be made because of nay revisions which may be made in published figures for the Consumer Price Index after the effective date of each cost-of-living adjustment.

Note: This section is contained in this collective bargaining agreement for reference only as agreed to by the parties. Remains frozen and no adjustment under this section will be made during the term of this collective bargaining agreement

Negotiated pension plan

E. In addition to the wage scales above set forth in this Section 5, the Agency agrees that it shall contribute monthly to a Retirement Benefit Plan, heretofore negotiated and adopted by the parties hereto, the sum of One Dollar and Twenty-Nine Cents ($1.29) per shift's pay earned (not exceeding 260 shifts per year) for each employee covered by this Agreement.

The Agency agrees to participate in the CWA/ITU Negotiated Pension Plan on behalf of the employees covered by this Agreement. Such participation will take place under the conditions provided for in the appropriate trust agreements and under the conditions outlined in Sub-Sections (1) and (2) of the Sub-Section.

1. The Agency will pay to the fund for each straight-time shift worked by each employee covered by this Agreement an amount equal to 4.057% per straight-time shift of the day scale. A straight-time shift means any shift worked for which the straight-time rate has been paid and shall be interpreted to include scheduled paid vacation days, holidays worked which shall be counted as one straight-time shift and holidays scheduled to be worked and not required to be worked, but shall not include scheduled off-days worked. This obligation shall apply to a maximum of five (5) straight-time shifts in any payroll week for any one (1) employee.

The total contribution to the NPP effective May 6, 1991, is $6.12 per shift, $30.60 per week.

2. The office shall have no financial liability hereunder beyond the payments required to be made as above stated, and the payments shall at all times be contingent upon the CWA/ITU Negotiated Pension Plan being qualified under the Internal Revenue Service regulations applicable to qualified pension plans.

3. Employees working one-half shift or more will have a full pension contribution made for that shift.

SECTION 6. *Jurisdiction*

A. Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as: hand compositors, machine operators, makeup men, bank men, proofpress operators, proofreaders, machinists for typesetting machines, operators and machinists for all mechanical devices which cast or compose type or slugs, or film, operators of tape perforating machines and recutter units for use in composing or producing type, operators of Justowriters and Varitypers, operators of all phototypesetting machines (such as Fotosetter, Photon, Linofilm, Monophoto, Coxhead Liner, A.T.F. Typesetter, Varitype Headliner, Filmotype, Typro, Fotomaster, Pro-Type, photo lettering machines, Hadego, Alphatype) and employees engaged in proofing, waxing, paste makeup with reproduction proofs and employees processing the product of phototypesetting machines, including development, waxing, paste makeup of all type, hand lettered, illustrative, border and decorative material constituting a part of the copy ruling, photoproofing, corrections, alterations and imposition of paste makeup serving as the completed copy for the camera used in the platemaking process. Paste makeup for the camera as used in this paragraph includes all photostats and prints used in offset or letterpress work and includes all photostats and positive

proofs of illustrations (such as Velox) where positive proofs can be supplied without sacrifice of quality or duplication of efforts. The Agency shall make no other Agreement covering work above mentioned especially no Agreement using the word "stripping" to cover any of the work above mentioned in producing completed copy. Paste makeup matter must be completed and ready for the platemaking camera before being sent to any other department.

The term paste makeup as used in this Agreement applies to the paste makeup of matter to be used in the newspapers of the Agency. However, a certain volume of promotional advertising paste makeup and rotogravure work is being done by persons in other departments and may be continued until it becomes possible to give such work to journeymen and apprentices under the terms of this Agreement without jeopardizing relations with newspaper customers, or changing the present work of existing departments now doing such work, provided such work now done in any department not now covered by Agreement with another union may not be so covered and when found expedient may be brought under the terms of this Agreement

In the event of the increase of the volume of such work (not including fluctuation in volume of presently existing sections due to business or seasonal growth), or to the introduction of a photocomposition process, the resulting paste makeup work will be done under the terms of this Agreement. The Agency agrees to supply full opportunity to journeymen and apprentices to become proficient on paste makeup and its attendant processes on adequate equipment and the Union agrees to supply partially trained journeymen and apprentices for that purpose in accordance with the above provisions.

Nothing herein shall preclude sending glossy proofs to an advertiser for the making of photographically enlarged, reduced or screened plates by the advertiser to be incorporated in ads to be used in a newspaper of the Agency.

Foreman

B. In the composing room covered by this Agreement, the foreman is the only recognized authority. Assistants may be designated to direct the work, but only the foreman may employ and discharge. Composing room employees shall be employed, receive orders from, laid off and be discharged by the foreman and by none other. In the absence of the foreman he shall designate and post who shall be foreman during his absence and such person shall have full authority.

The authority of the foreman shall be exercised in a nondiscriminatory manner under law and this Agreement.

Applications for work by others than those holding priority rights in the composing room must be made only to the foreman, who is the only person having the authority to employ and assign journeymen in the composing room.

Discharge

C. Foremen of printing offices have the right to employ help and may discharge (1) for incompetency, (2) for neglect of duty, (3) for violation of office rules, which shall be kept conspicuously posted, and which shall in no way abridge the civil rights of employees, or their rights under accepted Printing, Publishing, and Media Workers Sector of The Communications Workers of America Laws, and (4) to decrease the number of regular situations, such decrease to be accomplished upon the class of work indicated by discharging in the reverse order of priority standing.

D. An employee discharged to reduce the force shall be reemployed either as a regular or extra upon work he is competent to perform in the order of priority standing.

E. Persons considered capable as substitutes by the foreman shall be deemed competent to fill regular situations and the substitute oldest in continuous service, if competent to perform the duties of the situation to be given out, shall have prior right to the first vacancy. This section shall apply to incoming as well as outgoing foremen.

F. Employees exercising priority upon classes of work other than that upon which they have already established competency in the office may be held incompetent by the foreman, but shall not therefore be subject to discharge from the office. Upon having been held incompetent upon a certain class of work, such employee may be barred from claiming that class of work for a period not to exceed six (6) months.

G. When an employee is discharged for any reason he may demand (such demand to be in writing), and the foreman shall give in writing, the reasons for discharge, provided the demand shall be made within seventy-two (72) hours after the employee is informed of his discharge. An employee who desires to contest his discharge may appeal to the chapel and thence to the Union through the Executive Committee. After the decision of the chapel, and pending appeal to the Union, the matter shall be referred to the President of the Union and a representative of the office in which the discharge occurred, who shall endeavor to settle the dispute. Either party may appeal to the Joint Standing Committee against the Union's decision. If the discharged employee is ordered reinstated, the Committee shall fix the sum due, if any, for time lost.

Style posted

H. The office shall keep an authentic style posted.

Chapel meetings

I. All chapel meetings shall be held outside of working hours, provided, however, a discharged employee shall be entitled to such meeting during working hours on the shift not to exceed (30) minutes and at a time approved by the foreman. At no time shall chapel meetings delay editions or disrupt the work of the office. No other chapel meetings may be held during working hours except with permission of the foreman.

J. All working time belongs to the office. The employees shall temporarily or permanently perform any work within the jurisdiction of the Union as recognized in Section 6(a) of the Agreement. Provided: Transfers shall not be made which (l) are discriminatory (2) which evade priority rights of members. The regular hours of composition shall be regulated by the foreman and the chairman of the chapel in accordance with the requirements of the office. The foreman shall have the privilege of calling his regular force, or any part of it, to work at different hours. Starting time for a regular situation shall be the same at least four (4) days during the work week; provided that, by mutual agreement between the foreman and the situation holder, such situation holder may accept three (3) same starts. Notice of any change in starting time of a situation shall be given before quitting time on the previous shift. When a vacant situation is to be filled, or where the starting time of such situation is changed one (1) hour or more, any situation holder competent to perform the work who has superior priority standing may claim the new situation or starting time.

SECTION 7. *General Laws.*

It is understood that the General Laws of the Printing, Publishing and Media Workers Sector of the Communications Workers of America, in effect at the time of execution of this Agreement (a copy of which is hereto attached), not in conflict with law or this agreement, shall govern relations between the parties on conditions not specifically enumerated herein. For the purpose of fulfilling the intent of Article VI, Section 5, of said General Laws, effective with the date of operation of the Detroit Newspaper Agency and for a period of one year from that date, the Agency agrees to respect and observe the attached regulations governing the posting and cancellations of over-time, specifically Article XXV of the By-Law's of the Detroit Typographical Union No. 18, in effect on July 8, 1991.

Section 8. *Struck work.*

The Agency agrees not to require employees to execute work received from or destined for another employer (other than the Agency signatory to this Agreement) whose employees are locked out or on a strike authorized by the Communications Workers of America under circumstances which make the Agency an "ally" of such other employer and such work shall not be within the scope of the employment of employees covered by this Agreement. No employee shall refuse to execute such work until forty eight (48) hours after notice of such strike or lockout has been given to the Agency by the Union.

Section 9. *Joint Standing.*

A. Immediately after consummation of this Agreement a Joint Standing Committee of four members shall be appointed, two member of said committee to be named by the Agency, and two members by the Union. In case of a vacancy on the Joint Standing Committee from any cause, said vacancy shall be filled immediately by the appointment of a new member by the party in whose representation on the Joint Standing Committee the vacancy occurs.

B. To the Joint Standing Committee shall be referred for settlement all disputes arising out of the operation of this Agreement and all disputes regarding the interpretation of any portion of this Agreement. When a difference arises as to the interpretation and application of any provision of this Agreement, the wages, hours and working conditions prevailing prior to the change out of which the difference arose, shall be preserved unchanged pending decision by the Joint Standing Committee. There shall be no interruption and work in the composing room shall continue until a decision is rendered. The foregoing does not require reinstatement of a discharged employee pending a decision. The Joint Standing Committee must meet within ten (10) days (two (2) days in discharge

cases), from the date on which either party hereto, through its authorized representative, notifies the other party in writing that a meeting is desired, and shall proceed forthwith to settle any question before it. Such decision to be final and binding on both parties to this Agreement.

C. If the Joint Standing Committee cannot reach an agreement on any dispute, including disputes regarding discharged men, within ten (10) days (this time may be extended by agreement) from the date on which the dispute is first considered by it, at the request of either party hereto they shall select a fifth member from a panel of five arbitrators, to be selected by agreement of the parties within thirty (30) days after the signing of this Agreement, who shall act as chairman. The Committee shall proceed with all dispatch possible to settle the dispute. It shall require the affirmative vote of at least three (3) of the five (5) members to decide the issue and the decision in all cases shall be final and binding on the parties hereto. The decisions shall be signed by all members of the Committee, but is legal and binding when signed by a majority. Provided, Local Union Laws not affecting wages, hours or working conditions and 1988 General Laws of the Printing, Publishing & Media Workers Sector of The Communications Workers of America shall not be arbitrated.

The Chairman (arbitrator) shall be selected by a process of elimination. The first party to strike a name from the panel will be selected by lot. Thereafter, the parties shall alternatively strike names until only one (1) arbitrator remains. That arbitrator shall serve as chairman of the Joint Standing Committee.

D. If a discharged employee be reinstated by the Joint Standing Committee or Board of Arbitration either the Committee or the Board has jurisdiction to determine if there shall be pay for lost time, and if so, the amount thereof.

SECTION 10. *Vacations.*

A. All employees, as of December 31 of any year, shall be entitled to vacation credits in the amount of one-eleventh (1/11th) of wages earned the preceding calendar year, such vacation in no case to exceed twenty (20) days.

B. Vacation credits may be liquidated only in the calendar year following the calendar year in which they are earned. Provided, in cases of withdrawal from the office prior to December 31 of any year, accrued vacation credits of that calendar year shall be paid to the employee at the time of termination of employment on the basis of one-eleventh (1/11th) of a day's pay credit for each day's pay earned during that year.

C. In case employment ceases because of death of employee, the value of accrued vacation credits shall be paid to the heir-at-law of the deceased.

D. Fractional credits may not be carried forward from one year to another.

E. No employee will be allowed to forego vacation or any part thereof in any calendar year for the purpose of adding to the length of vacation of any succeeding year.

F. Time lost due to disability compensable under Section 42 herein shall be counted as time worked for the purpose of computing vacation credits to be liquidated in the following year.

G. The rate of pay for a vacation period shall be determined by the rate applicable to the majority of shifts worked by the employee in the seven (7) weeks preceding the taking of vacation provided that in case of substitutes the rate shall be that applicable to the majority of shifts worked by the substitute during the last two weeks in which he worked prior to taking his vacation.

H. Vacation credits shall not be assignable.

I. The days of the vacation period shall be consecutive, but the weeks of vacation need not be consecutive.

J. Vacations are to be taken in addition to any time off of employees because of accumulated overtime, or for any other reason.

K. No employee shall be required to accept a vacation at any time except between May 1st and September 15th, except that, by mutual agreement between the employee and the foreman, vacations may be scheduled outside the above period; provided, however, vacation in excess of fifteen (15) days shall be taken outside the vacation period set forth above. Notwithstanding the above, it is understood that, in case of a shortage of competent men, or other unusual circumstances or emergency, the office may revise the vacation schedule. The employee affected by such revision shall be permitted to choose another period suiting his convenience provided such time is also convenient for the office.

L. Insofar as possible, vacation periods shall be allotted by priority. In arranging vacation schedules, when other factors are equal, the employee having the greatest priority shall be given preference on the first selection.

M. Employees on paid vacations have no right of substitution. The office retains the sole right of determining how many, if any, vacation coverage situations shall be created.

N. The provisions of Section 6(j) shall not apply to the situations of employees on vacation, but shall apply to the situations created for vacation coverage.

O. When a holiday falls within an employee's vacation period, he shall be given a choice of either receiving an additional shift's pay at his straight-time rate as part of his vacation or an additional day off (with pay) as part of his vacation. The employee shall make his choice known to foreman prior to his leaving on vacation.

P. Situation holders having a fourth week of vacation may schedule the five (5) days of that vacation on an individual day by day basis with prior approval of the foreman.

SECTION 11. *Shifts*

Day Work—Shifts beginning and ending between the hours of 7:00 a.m. and 6:00 p.m. shall be paid for at the rate established for day work.

SECTION 12.

Night Work—Shifts beginning at or after 6:00 p.m. and before 8:31 p.m. shall be paid at the rate established for night work.

SECTION 13.

Third Shift—Shifts beginning at or after 8:31 p.m. and before 7:00 a.m. shall be paid for at the rate established for third (lobster) shift.

SECTION 14.

Split Shifts—Shifts beginning during the hours established for day work and ending after 6:00 p.m. shall be classed as split shifts and paid for at the night rate. Provided, overtime worked at the end of a day shift shall not change such shift to a split shift.

SECTION 15.

A split situation is a situation composed of a combination of day and/or night and/or lobster shifts on such situations each shift shall comprise the hours prescribed herein for such shift. No shift on a situation shall be paid for at a lesser hourly rate than the majority of shifts on that situation.

SECTION 16. *Extras*

Extras shall be employed upon the class of work which they are competent to perform in the order of their priority standing.

SECTION 17. *Sits/Courtesy*

A. Employment of a substitute or extra upon the same class of work five (5) day shifts or five (5) night shifts within a financial week shall create a situation. For the purpose of this section, a third shift shall be construed as a night shift.

The Agency agrees that it will continue to recognize "Courtesy Priority" on permanent work assignments within a classification.

Pre-Press Classification

B. Electronic Ad Makeup Operator—Operates the Electronic Ad Makeup Systems (Harris, DTI, SII today, Triple-I or any system that is purchased.)

Pagination Operator—Operates the SII Classified Pagination system. (Classified, stocks, etc.)

Scitex Operator—Operates the Scitex Electronic Color System, the Electronic Scanners and related equipment, including but not limited to the Raystar output devices and color proofing devices.

Black and White Camera Operator—Operates all Black and White cameras in the Pre-Press department. Responsible for all camera operations with the exception of all Color operations and the Chemco Transmission system, covered elsewhere.

Page Makeup—Positions the type on the pages under the direction of the Editorial Departments. This classification is similar to the Page Makeup classification today except the people who take the type from the typesetter and prepare it to place on a page ("Slashers") are not included.

Technicians—Maintains and repairs equipment in the Pre-Press Department that is not maintained by the Electronic Maintenance Department. (Processors, copiers, mechanical equipment, etc.)

Floor—All other positions in the Pre-Press Department that are not defined in one of the above classifications, including but not limited to:

Ad Input Operator

Ad Pasteup

Ad Logger and Control Desk

"Slashers"

Proofreading

Chemco Transmission System Operator

Manual color "stripping"

Certain jobs (*i.e.* Operating Typesetter) in Pre-Press can be done by any competent employee covered by the CBA as required.

Any qualified employee in the Pre-Press department covered by the Collective Bargaining Agreements, may operate any piece of equipment as necessary regardless of classification.

The Office remains the sole judge of competency and the ability of an employee to hold a job in any classification.

SECTION 18. *Situation defined*

Five (5) days of seven and one-half (7 1/2) hours each (exclusive of lunch time) shall constitute a day situation. Five (5) nights of seven and one-quarter (7 1/4) hours each (exclusive of lunch time) shall constitute a night situation. Five shifts of six and three-quarter (6 3/4) hours each (exclusive of lunch time) within the period designated shall constitute a third (lobster) shift situation. Five (5) shifts of not more than seven and one-quarter (7 1/4) hours each (exclusive of lunch time) shall constitute a split shift situation, as referred to in Section 15.

SECTION. 19. *Overtime*

A. All time worked in excess of the unit of hours constituting a regular shift shall be classed as overtime and shall be paid for at one and one-half (1 1/2) times the regular hourly rate based upon the employee's regular wage.

B. All overtime on any one shift shall be distributed as equally as possible by the foreman through the chairman among those employees competent to do the work on which overtime is to be worked. Such overtime shall be equalized within a reasonable period.

SECTION 20. *6/7 day operation.*

It shall be optional with the office to operate its composing room six (6) or seven (7) days a week and as many shifts as desired to meet requirements under the conditions set forth in this Agreement. The particular days or nights constituting a situation shall be designated by the foreman, and insofar as practicable, the five (5) shifts constituting a situation shall be consecutive. At all times there shall be such number of situations as are necessary to meet the minimum office requirements, thereby reducing to a minimum the number of extras employed. Notice of change of an off-day or off-night of a situation shall be posted by the foreman not later than Thursday of the work week preceding the week the change is to take effect.

SECTION 21. *Sit equals 5 days.*

No employee shall be required or permitted to hold a situation consisting of more than five (5) days or five (5) nights, or a combination of day's and nights equivalent to five (5), in any one financial week.

SECTION 22. *Foremen exempt*

The general foreman, the night shift foreman and seven (7) additional non-working foreman are exempt from this contract and shall confine themselves to non-mechanical work.

Managers and Supervisors—With the following modifications. all managers, assistant managers, and supervisors in the Pre-Press Departments are exempt from this contract. Any supervisory employee may be permitted to demonstrate work methods in emergencies, for training, or to assist a bargaining unit member in Pre-Press operations.

Work Directors—Journeymen may be designated as a "Work Director" to supervise such work as may be determined by the supervisor. Five (5) work director situations, selected by management, will not be subject to claim for a one-year trial period. Following the trial period the protected situations will be subject to review by the parties.

The names of all mangers, supervisors, and journeymen designated to act as Work Directors shall be kept posted.

SECTION 23. *Layoffs*

Notice of discharge to reduce the force must be given to the chapel chairman twenty-four (24) hours prior to the employee's quitting time on the last shift of the calendar week.

SECTION 24. *Lunch*

Lunch time (length of which shall be regulated by the chapel and the foreman, but which shall not be less than thirty (30) minutes nor more than forty-five (45) minutes) shall be designated by the foreman at the convenience of the office and shall not be paid for. No journeyman or apprentice shall work less than three and one-half (3 1/2) hours nor more than four and one-half (4 1/2) hours before taking the regular period of time for lunch. If employees are required to work more than two (2) hours overtime after the completion of

their regular shift, an additional lunch period which shall be paid for at the overtime rate shall be allowed, or in lieu thereof, at the option of the office, the employees will be paid an additional thirty (30) minutes at the overtime rate.

SECTION 25. *Overtime pay*

Payment for overtime shall be for actual time worked in excess of the unit of hours constituting a shift. Not less than time and one-half shall be paid for any shift worked in excess of five (5) within a financial week. When an employee is required to work on a regular off-day or off-night, not less than his overtime rate shall be paid for such work performed. Employees not eligible for work at straight-time rates shall not claim work nor be permitted to work except with prior approval of the foreman.

SECTION 26. *Full shift*

No employee shall be employed for less than a full shift.

SECTION 27. *Holidays*

A. The following days or days celebrated as such are the recognized holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and the employee's birthday for employees with six (6) months or more of priority.

B. If the employee's birthday falls on one of the other six (6) recognized holidays, such birthday holiday shall be observed the day following such holiday, if the employee's birthday is February 29, such birthday holiday shall be observed on March 1 in any non-Leap Year.

If an employee with six (6) months or more of priority is scheduled for work but is unable to work due to disability or illness when his birthday occurs, said employee shall receive an additional shift's pay at his straight-time rate.

C. If an employee's day off falls on a holiday, he shall be given a choice of either additional shift's pay at his straight-time rate, or another day off (with pay) during the holiday week or in his next two (2) fiscal weeks, except that in emergencies due to shortage of men, the extra day may be designated in the following week. The employee shall make his choice known to the foreman not later than the end of the week preceding the week in which the holiday occurs.

D. Where such recognized holiday falls on an employee's regularly scheduled work day and he is not required to work by the office, he shall receive a full shifts pay at his regular rate.

E. Where an employee is required by the office to work on such recognized holiday he shall work the full shift and shall receive double time for the shift worked. Starting times on holidays may be rearranged at the convenience of the office without reference to any limitation elsewhere set forth in this Agreement.

F. Substitutes working fifteen (15) shifts in the thirty (30) calendar days prior to a holiday will receive holiday pay.

SECTION 28. *Holiday starts*

Holidays shall be from midnight to midnight of the day legally celebrated as such. The premium rate shall apply only to shifts regularly scheduled to start within the twenty-four (24) hour holiday period and shall not be construed as applying to regular shifts, which may overlap into any holiday. Change of starting times regularly scheduled within the twenty-four (24) hour holiday period shall not change their status as holiday shifts.

SECTION 29. *Chairman reset*

It is recognized that this contract differ from previous agreements between the parties in that it includes provisions for specific additional benefits and preservation of work

opportunities for employees in lieu of previous contract provisions which required the reproduction of certain advertisements received from sources outside of the composing room.

It is understood and agreed that the Agency has the right to use such material without subsequent reproduction of such work by employees covered by this Agreement.

SECTION 30. *Proofreading*

All type matter set in the composing room must be read by journeymen or apprentices, whether the proofs are read before or after the type is used.

SECTION 31. *Competency*

A journeyman working in an office for thirty (30) working days shall be considered competent to hold a situation.

SECTION 32. *Substitutes*

Employees not holding situations shall be classified as "substitutes" or "extras". Substitutes hired as office extras four days or less in any one payroll week in any one office shall be paid two dollars ($2.00) per day in addition to the regular scale for the shift worked. In any payroll week, five days or more employment as an office extra in any office shall be paid at the regular rate. Provisions of this section shall not apply to shifts for which the overtime rate is paid, not in cases where the employee is not available to the office for five shifts during the financial week.

SECTION 33. *Full day's wages*

Any situation holder, substitute or apprentice starting work shall be paid his full day's wages unless voluntarily laid off or discharged for cause.

SECTION 34. *Ten-hour law*

Not less than ten hours shall elapse between the completion of a shift's work and starting of another, except in cases of extraordinary emergency. Where an extra edition is issued

and employees are not available who have had ten hours elapse from their quitting time, this shall be construed to be an extraordinary emergency under the terms of this section.

SECTION 35. *Sub Starting late*

Any employee reporting at the established showup time for substitutes, if later put to work, shall be deemed to have started work at the regular showup time, shall be given a full day's pay, and shall cease work with the regular force.

SECTION 36. *Machinist/Techs*

Competent machinists and/or technicians shall have charge of repairs, adjustments and all work connected with the maintenance and care of equipment.

SECTION 37. *Call-in/call back*

A. When a situation holder, or a substitute covering a situation, because of the issuance of an extra edition or other urgency, is called on to perform work at hours other than his regular starting time, he shall be paid $2.00 extra for said call-in plus the regular overtime rate for time worked until beginning of regular shift and straight time thereafter for his regular shift, provided, when a day situation holder or substitute covering a day situation, is called in before 7:00 a.m., may have the option (at the time he is called) of accepting lobster hours and rate (with $2.00 call-in). A call-in as provided in this section shall not be considered a change in starting time.

B. When an employee, after completion of his regular days or nights work, is called back after leaving the office, he shall receive $2.00 extra for said call-back in addition to the overtime rate for the night or day scale, as the case may be, provided that in no case shall he receive less than one hour's pay at the overtime rate in addition to the compensation for call-in.

C. When a situation holder is called to work a shift or shifts outside of his regular work week, such call shall not be considered a "call-back" or "call-in".

SECTION 38. *Sub call-in*

Except as provided in Section 35 hereof when an extra is called on to perform work upon an extra edition at hours other than his regular show-up time, he shall be paid $2.00 per day in addition to the wages stipulated in this Agreement for those hours.

SECTION 39. *Starts poster*

All starting times and days off shall be posted.

SECTION 40. *Bereavement*

Any employee, with six months' service with the employer, upon death of a member of his immediate family, shall receive a three-day leave with pay for days when otherwise scheduled to work. The employee shall designate when such leave shall start. The immediate family shall consist of father, mother, spouse, children, sister, brother, step-children, step-parents, mother-in-law, father-in-law, grandfather, grandmother and grandchildren.

SECTION 41. *Half pay*

A. The Agency will pay the premiums for sickness and accident insurance issued by a company of their selection providing the following schedule of benefits for a period of 26 weeks:

1-BASIC WEEKLY EARNINGS.

2-WEEKLY SICKNESS AND NON-OCCUPATIONAL ACCIDENT BENEFIT. BEGINNING WITH 9th DAY.

3-WEEKLY OCCUPATIONAL AND NON-OCCUPATIONAL ACCIDENT BENEFIT. FIRST WEEK.

4-OCCUPATIONAL ACCIDENTS WILL PAY THE GREATER OF THE TWO.[1]

1	2	3	4
$500 and over	$357.00	$357.00	a

Medical/Hospital Insurance

B. The Agency agrees to continue provisions of the current Blue Cross health and welfare benefits for all bargaining unit members and eligible retirees as per the current Agreement, for the life of this Agreement, provided; if the Agency established that Blue Cross has become noncompetitive or is overcharging the Agency, utilizing concrete facts and figures, it shall apprise the Union of same, and the Union shall not unreasonably withhold its consent to change to a comparable carrier providing comparable coverage. If the Union refuses to agree to such a change, the dispute shall be submitted to expedited arbitration, and the status quo (Blue Cross coverage) shall prevail until the matter is decided by an arbitrator.

Eligibility for regular full-time employees shall commence on the first of the month following the completion of one (1) full calendar month of employment.

C. The Blue Cross/Blue Shield Plan will contain cost containment measures including the "Pre-Certification Program", "Mandatory Second Opinion Program", "Ambulatory Surgery Initiative Program", "Maximum Allowable Cost Prescription Drug Program" and the "Pre-Determination Foot Surgery Program." The Agency will ensure employees will

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[1] If the maximum primary weekly benefit under Workers' Compensation is changed under Michigan Law, the weekly occupational accident benefit payable hereunder for the 2nd through the 26th week will be changed so that the employee will receive a total amount for such weeks under Workers' Compensation and hereunder to equal the amount provided for the first week.

not lose benefits as a result of these cost containment programs provided the employee follows all of the prescribed procedures as outlined in each of the above programs.

D. Retirees (present and future) will be covered by the same plan. The Agency will continue its practice of paying fifty percent (50%) of the premium increase based upon the composite rate increase. To be eligible for the above programs an employee must have a minimum of five (5) years continuous service as a regular situation holder with the Agency at the time of retirement.

(1) The composite rate shall be determined each September in the following manner. All monthly premium costs shall be compiled by contract (single, 2 person, family, retiree, etc.) including both Blue Cross/ Blue Shield and HMO's of all bargaining units of the Agency and divided by the number of employees enrolled in the medical insurance programs.

(2) The composite rate as of January 1, 1991 has been determined to be $386.34. The Agency shall establish a new composite rate as quickly as possible.

E. Employees electing any of the HMO plans for the insurance coverage will have the amount of such plans' monthly premium paid for by the Agency, up to a maximum monthly premium equal to the monthly premiuim for the appropriate Blue Cross/Blue Shield Plan or other plan as may be provided by the Agency. Any increases above this monthly rate will be paid for the by the employee. The Publisher will provide to employees electing HMO plans dental coverage equal to present coverage.

F. All active and retired participants and their eligible covered dependents in the Blue Cross/Blue Shield Program who, by reason of age or disability, are eligible for Social Security Medicare, Parts A and B, and assume such coverage,

the Blue Cross/Blue Shield Programs shall be modified to afford them total coverage in the same amount as those under age 65 and not disabled.

G. For the purposes of medical insurance and life insurance, retirees are those employees who retire from employment, including disability retirement, under any plan in which the Agency participates.

H. Continuation of coverage in effect for a retiree shall be offered the surviving spouse in the event of the retiree's death. Such coverage shall continue in effect for up to twenty-four 24 months commencing with the first of the month following the date of the retiree's death, so long as the required retiree's premium payments continue to be made in a timely manner to the Agency.

I. This Agreement shall continue the option that certain unions have paid a portion or all of the retiree medical monthly premium in lieu of the retiree paying such monthly premium, via a diversion from wages or from the local treasury.

J. Effective May 1. 1994, $1.00 per shift paid (maximum 260 shifts per year) will be paid to any benefit plan or plans designated by the Union. It will not be paid as wages.

K. The Agency will provide $5,000 group life insurance until retirement. Retirees after June 18, 1984 will be covered by $3,000 group term life insurance.

By diversion, the group term life insurance has been increased $10,000 (a total of $15,000).

Effective May 1, 1994 life insurance increase of $5,000.00 (a total of $20,000.00).

Jury Duty

L. When an employee, covered by this Agreement is summoned for jury service, he (she) will be paid the

difference between the fee he/she receives for service and the amount of regular, straight-time earnings lost by the employee by reason of such service.

In order to receive payment for such service, the employee must give the foreman prior notice that the employee has been summoned for jury duty and must furnish satisfactory evidence that he/she reported for and performed jury duty on the days for which he (she) claims such payment.

Whenever the employee is temporarily excused from such jury duty by the court on his (her) scheduled work day, the employee shall advise the foreman as promptly as possible and stand ready to report to work if requested to do so by the Agency.

SECTION 42. *Apprentices*

A. An Apprentice within the meaning of the Agreement is a beginner at the typographer's trade, setting type and doing such other work as is required to learn the typographer's trade, one under the instruction of a journeyman. Four years shall constitute an apprenticeship.

B. The starting age for an apprentice shall be after his or her 18th birthday.

C. Apprentices may be employed in the ratio of one to every nine journeymen, or a major fraction thereof.

D. The Detroit Printers Joint Apprenticeship Committee (composed of an equal number of representatives of the Union and of the Employers of the printing industry in Detroit) shall continue to administer the apprenticeship program. All provisions of this Agreement affecting apprentices shall be under the jurisdiction of this committee which shall have control of, and be responsible for, the selection of apprentices and shall be vested with full power and authority to enforce all conditions outlined herein. Should the committee fail to agree on any question, the

matter shall be submitted to an arbitrator who shall be the head of the Detroit office of the Bureau of Apprenticeship, U.S. Department of Labor.

E. No apprentice will be allowed to start work without first being examined and approved by the Committee.

F. The foreman, the Chairman and the Joint Apprenticeship Committee shall see that apprentices are duly instructed and advanced in their apprenticeship course and in the ITU Course of Lessons in Printing, if required.

G. All apprentices will be under the supervision of a joint Apprenticeship Committee who shall have the authority to terminate the apprenticeship of any apprentice who does not show aptitude and proper qualifications for the work, or for any other good reason.

H. Apprentices shall be governed as to hours, regulations and laws, rates of wages paid and shop practices the same as are journeyman; provided that no apprentice be permitted to work on any shift or work overtime unless nine journeymen are employed on the shift or are working overtime.

I. The Agency agrees to reimburse apprentices employed up to a maximum of $216.00 per calendar year for application to tuition only for classes required or approved by the Joint Apprenticeship Committee and taken on the employee's own time, provided a passing grade is maintained.

Further, the Agency agrees to pay annually, on a pro-rata basis as of June 18, 1978, an amount equal to that derived from the following formula:

Wherein

A = Amount to be paid by affected employers

J = Number of Journeymen employed by that employer

TU = Total number of Journeymen in participating shops under contract to DTU No. 18

$$A = \frac{\$155.00 \times J}{TU}$$

J. Discharge of an apprentice by an employer after a continuous service of one or more years by said apprentice will not be allowed except for good and sufficient reason, such as might be applicable in the case of a journeyman.

K. Each duly registered apprentice shall receive a progressive course of instruction that shall familiarize him with the different branches of the typographer's art, as such Office may embrace, and shall be distributed as per employer's schedule of training submitted by the foreman to the Detroit Printers Joint Apprenticeship Committee for their advice, suggestions and approval.

SECTION 43. *Sanitation*

The composing room of the Agency shall be maintained in a sanitary condition in accordance with the laws of the State of Michigan.

SECTION 44. *Equipment jurisdiction*

A. Both parties to this Agreement recognize Teletypesetter and/or Electro-Typesetter equipment and method of operation, including tape perforator and recutter units, tape box and control board in the production of type, as being within the jurisdiction of the Union.

B. The Union agrees that operation and maintenance of the reperforator and teleprinter units (used in conjunction with and by the Editorial Department) which the Publishers lease from AP and UPI, or other recognized news services or syndicates, and which are used by said news services to furnish the Agency with the daily news report, is not composing room work within the jurisdiction of the Union.

The provisions of this paragraph are not to be construed to conflict with the Union's jurisdiction over the operation of keyboard perforators and other equipment as herein provided.

C. The Agency may use and employees covered by this Agreement will process;

1. Tape received from any source which is used for experimental research or test purposes only, and not for publication;

2. Tape produced by employees covered by this Agreement, and

3. Markets tabulations, markets fillers, markets tables, sport news and scores of sporting events transmitted by leased wire by the Associated Press or United Press International News Service in the form of teletypesetter perforated tape. All other tape must be perforated by employees covered by this Agreement.

D. Teletypesetter and/or Electro Typesetter casting units shall be tended by journeymen or apprentices, in their last two (2) years in a ratio of not more than one (1) to three (3).

E. It is agreed by both parties hereto that manual operation of linecasting machines (without the use of tape-operated units) may be used on all production for the Agency newspapers at its option.

SECTION 45. *Computer jurisdiction*

When a computer is performing composing room work the jurisdiction of the Union includes the preparation of input and all handling of output, operation of the computer and all input and output devices, programming (except the programming which is provided by the manufacturer or lessor as part of standard services for the lease of purchase of the equipment), and maintenance of all the equipment and devices. Nothing shall prevent the use of factory representatives or outside technicians for the installation or maintenance of equipment

requiring special technical skills, when employees covered by this agreement competent to perform the work are not available.

Nothing contained herein shall preclude the agency from using this computer to process input that would activate photo composition machines which might be installed in the future in accordance with the provisions of Section 7(a) of the collective bargaining agreement.

In respect to programming, it is agreed that: (1) systems analysis and functional flow charting is not covered by this Agreement; (2) when any work defined in (1) above is to be implemented as a computer operation, a detailed flow chart will be created, as well as coding or such other steps as may be necessary to make a program operational; this work will be performed by a composing room employee assigned to the computer operation; (3) any detailed flow chart, or coding, or such other steps as may be necessary to make a program operational that is prepared by composing room employees under (2) above, may be edited, modified or redrawn by persons not covered by this Agreement.

The right to utilization, concurrent or otherwise, of all or any part of an electronic data processing system by persons outside the bargaining unit for purposes other than the production of composing room work shall not be abridged by the provisions of this Supplemental Agreement.

In the event of a temporary emergency breakdown or interruption caused by mechanically or electrical failure, a backup computer may be used, and it is agreed that the input and output of such backup computer will be processed by employees covered by this Agreement during the period of such temporary emergency breakdown of interruption.

The Agency agrees to make arrangements for the training of composing room employees in programming and other computer operations, including maintenance, making

selection of the person(s) to be trained, with regard to aptitude and ability, from composing room employees who have evinced a desire to participate in such training. Suitable tests may be given to assist in making the selection. Composing room employees assigned to such training who fail to make satisfactory progress may, at the option of the office, through its representative the forman, be permitted to continue their training or be returned to their former status without loss of priority. After the initial person or persons are trained, additional trainees may be selected and tested, as described above, from among other composing room employees wishing this training, the number of additional trainees to be determined by the office through its representative, the foreman.

Unjustified tape operation

A. A competent tape perforator for unjustified, non-hyphenated tape is one capable of producing 60 words per minute net of unjustified tape in a 5-minute test, computed as described below.

B. A composing room employee who has, as of March 24, 1970, established competency in the justified, hyphenated tape operation, (attached is a list of such employees) shall be deemed competent in the unjustified tape operation and shall not be required to take a typing test; it being agreed and understood, however, that the Office may, at its option, give additional training to such employees.

C. If, at any time, there is not a sufficient number of competent tape perforator operators to meet the demands of the Agency, a ten (10) month training program shall be made available to composing room employees. To qualify for such training, a composing room employee shall be required to demonstrate an ability to type 45 words per minute net in a 5 minute typing test, computed as follows.

Five strokes count as a word; therefore, divide the total number of strokes by five. The result is the gross

words typed. Divide gross words typed by 5 to determine the gross words per minute. From the gross words per minute, deduct 2 words for each error.

D. After qualifying for the tape operation, as described immediately above, the employee shall be required to demonstrate progress in tape punching ability in accordance with the following schedule, in a 5 minute test, computed as described above:

At the end of 2 months.....48 words per minute net
At the end of 4 months.....51 words per minute net
At the end of 6 months.....54 words per minute net
At the end of 8 months.....57 words per minute net
At the end of 10 months.....60 words per minute net

1. During this training period, the employee shall be paid at the wage scale applicable to him as set forth is Section 6, as amended, of the collective bargaining agreement.

2. Composing room employees assigned to the tape operation training program who fail to make satisfactory progress as outlined above may, at the option of the foreman, be permitted to continue their training or be returned to their former status without loss of priority.

SECTION 46. *Bargaining*

It is agreed that the parties hereto have fully bargained with respect to wages, hours and all other terms and conditions of employment and have fully settled the same for the term of this Agreement in accordance with the terms hereof.

SECTION 47. *Parties to Agreement*

It is agreed that the only parties to his Agreement are the Detroit Newspaper Agency, through its authorized representative, the parties of the first part, and Detroit Typographical Union No. 18, by its officers or a committee, duly authorized to act in its behalf, party of the second part. It is further

agreed that the approval of this Agreement by the Communications Workers of America as complying with its laws does not make it a party hereto.

IN WITNESS WHEREOF, we have hereunto set our hands the day and year first above written.

for DETROIT TYPOGRAPHICAL UNION NO. 18/

for DETROIT NEWSPAPER AGENCY/

ELECTRONIC LAYOUT AND MAKEUP OF FULL OR PARTIAL PAGES

1. Composing room employees shall perform the original electronic makeup of all full display ad pages and the display ad portion of pages, following electronic, or paper layout dummies prepared by employees of other departments.

2. Employees of other departments will perform the electronic layout of complete new pages or the portion of pages represented by news matter, including news graphics. It is understood and agreed that if, in the process of laying out complete pages for final release to the next step in the production process, the office determines if it is necessary to transfer the display ads previously made up electronically by composing room employees, such transfer of ads will be performed by employees of other departments.

3. If it is necessary to electronically layout and makeup classified pages, or a portion of such pages, on a makeup terminal, the makeup terminal shall be operated by composing room employees.

MEMORANDUM OF UNDERSTANDING

The ongoing Memorandum of Understanding by and between DNA, hereinafter referred to as "the Publisher," and the Detroit Typographical Union No. 18/CWA, hereinafter referred to as "the Union," shall be attached to and become

part of the mutual obligation of the Publisher and the Union, under the collective bargaining agreement; between DNA and Detroit Typographical Union. No. 18/CWA, which is in effect from November 27, 1989 to and including April 30, 1992.

1. Change Section 7(b) an (j) beginning November 26, 1990 to allow the foreman the option of replacing an absent situation holder with a substitute, unless the regular has been denied the time off.

(a) If a regular situation holder request a day off and a substitute is not required, the absence will be without prejudice; that is, the absence will not be used for the purpose of any disciplinary action.

2. No regular situation holder of the DNA Chapel will be denied the right to a 90-day leave of absence in accordance with Article V, Section 4, PPMW General Laws if the foreman exercises his option not to replace him with a substitute. No regular situation holder will be denied time off for Union business.

3. In exchange for the modification to the right-of-substitution effective November 26, 1990, Sunday bonus of extra half shift pay eliminated, non-union foreman recognized and up to two column classified input allowed. Each regular named employee in the Guaranteed Job Roster as of the date of ratification and who continues employment as a regular will have Fifteen Dollars ($15.00) per week ($780.00 per year) placed into a jointly-administered fund beginning November 27, 1989. The contribution amount will be paid quarterly. Increases to Twenty Dollars ($20.00) per week ($1,040.00 per year), effective November 27, 1991.

The total contribution to the money purchase plan effective November 27, 1991, is $5.91 per shift, $29.55 per week.

The DNA will pay all costs related to money purchase plan effective November 27, 1989.

AGREEMENT re:
SPLIT SHIFTS/DAYS OFF

Mr. Alex Cellini
Detroit Typographical Union No. 18
1510 Book Building, Detroit, MI 48226

April 26, 1990

Dear Mr. Cellini:

This will confirm our agreement made in contract negotiations regarding split situations and days off. We agreed that the Superintendent and Chapel Chairman, after the execution of the agreement, would discuss and attempt to agree on ways to minimize split situations and days off.

Sincerely, John A. Taylor, Director
Labor Relations & Legal Affairs

* * *

AGREEMENT re:
FLATS ALTERED/KILLED/CHANGED

Mr. Alex Cellini

April 26, 1990

Detroit Typographical Union No. 18
1510 Book Building, Detroit, MI 48225

Dear Mr. Cellini:

This letter will confirm our agreement made in contract negotiations that flats (ads) will only be altered, killed or changed by employees represented by Detroit Typographical Union No.18.

Sincerely, John A. Taylor, Director
Labor Relations & Legal Affairs

* * *

AGREEMENT re:
PART-TIME EMPLOYEES

Mr. Alex J. Cellini, President
Detroit Typographical Union #18 CWA/ITU
2012 Book Building, Detroit, MI 48226

and

Mr. Robert Ogden, President
Graphic Communications International Union
Local #289m
1111 Woodward, Royal Oak, MI 48067

Gentlemen:

Regarding the utilization of part-time employees in the Pre-Press Department, we reached an understanding in the current negotiations that these part-time workers would not be utilized to displace full-time situations. In that regard, it is our intent that these employees will work less than a full week and where such utilization would warrant creating a five-day situation, we will pursue that option.

Sincerely, Timothy K. Kelleher

* * *

AGREEMENT re:
REVIEWING SKILLS

Mr. Alex Cellini, President
Detroit Typographical Union #18 CWA/ITU
2012 Book Building, Detroit, MI 48226

and

Mr. Robert Ogden, President
Graphic Communications International Union
Local #289m
1111 Woodward, Royal Oak, MI 48067

Gentlemen:

During negotiations for the 1992 contract, the issue regarding new hires, including both full and part-time, was discussed at length.

The Union will be involved in reviewing the particular skills and qualifications of any person hired by the Agency to work within the jurisdiction of the Union.

Sincerely, Timothy K. Kelleher

* * *

SIDE AGREEMENT

1. The Detroit Newspaper Agency (DNA), Graphic Communications International Union Local 289 (Local 289) and Detroit Typographical Union 18 (Local 18) have agreed to an arrangement of shared jurisdiction.

2. The Unions will share jurisdiction over all work covered by their respective Collective Bargaining Agreements. Local 289 will not dispute the assignment of work to employees represented by Local 18 and vice versa.

3. Local 18 and Local 289 will continue to represent the respective employees each Union currently represents.

4. Representation of new hires will be as follows: Local 18 will represent new hires number 1, 2, 3, 5, 6, 7, 8, and 10 and Local 289 will represent new hires number 4 and 9. The formula may be varied by mutual agreement of the DNA, Local 18 and Local 289 to take into account special circumstances of an individual new hire.

5. Local 289 members may continue to participate in the inter-local pension, the supplemental retirement and disability fund, have a contractual contribution to the pension plan of $1.29 per shift and have a diversion to the training fund of $3.75 per week all in accordance with past practice.

6. Seniority will be on a merged basis. The scheduling and duration of shifts will be in accordance with Local 18's contact. However, no employee's weekly regular pay will be reduced as a result.

7. Any provision of the Agreement between the DNA and Local 18 in conflict with this Agreement is superseded by this Agreement.

8. The work covered by the respective Collective Bargaining Agreement of Local 289 and Local 18 is modified by the withdrawal with prejudice of the four grievances attached hereto.

APPENDIX K

MEMORANDUM AGREEMENT

Between

DETROIT FREE PRESS

and

DETROIT TYPOGRAPHICAL UNION NO. 13

This Memorandum of Agreement, by and between the Detroit Free Press, hereinafter referred to as "the Publisher" and the Detroit Typographical Union No. 13, hereinafter referred to as "the Union," shall be attached to and become part of the mutual obligation of the Detroit Free Press and the Union, (but not an obligation of the Detroit News, unless otherwise so developed), under the collective bargaining agreement between the Detroit Free Press and Detroit Typographical Union No. 13, which is in effect from June 13, 1974 to and including June 17, 1977.

1. STATEMENT OF INTENT

The Publisher and the Union have engaged in collective bargaining between October 1, 1974 and January 10, 1975 to develop job guarantees and work opportunities, together with immediate and prospective monetary rewards, in return for the removal of past and future reproduction (re-set) obligations and the clearance for the Publisher to enjoy the benefits in their composing room of the new technology, including, but not limited to, video display terminals and scanner equipment.

This document represents a collection of settlement terms which shall be made part of the labor contract obligation of the Publisher and the Union.

2. JOB GUARANTEES

Every individual Detroit Free Press priority holder on the 11-11-74 Detroit Free Press priority list from Number 1 to, and including, Number 207, shall be enrolled on the Job Guarantee Roster, which shall include the following names, and them only:

(1) Darling, E.C.
(2) Baumblatt, E.
(3) Martin, F.
(4) Buchner, A.
(5) Baulch, D.
(6) Jackson, K.
(7) Hill, D. G.
(8) Korzecke, L.
(9) Aufderheide, C.
(10) Steele, H.
(11) Leatherman, W.
(12) Estes, C.
(13) McBrien, T. R.
(14) Walsh, J. K.
(15) Nowakowski, M.
(16) Zena, P.
(17) Steinman, E.
(18) Snow, J.
(19) Reinke, J. F.
(20) Vella, J.
(21) Slusarczuk, A.
(22) Fechtner, A.
(23) Pawlowski, R.
(24) Ivascow, M.
(25) Nicks, C. S.
(26) Burke, P.
(27) Walters, H.
(28) Muir, W. E.
(29) Maynard, G.
(30) Calcaterra, J.
(31) Spence, E.
(32) Spence, R.
(33) Lashbrook, R.
(34) Evans, M.
(35) Hammond, A. R.
(36) Curzon, L.
(37) Campbell, W.
(38) Robinson, J.
(39) Herbon, J.
(40) Kelly, T.
(41) Meddaugh, L.
(42) Tibbs, A.
(43) Fultz, R.
(44) Flemming, R.
(45) Dowgiallo, P.
(46) Bauman, U.
(47) Niles, R.
(48) McCauley, E.
(49) Collins, F.
(50) DePoole, J.
(51) Madley, S.
(52) Oyafuso, W.
(53) Holman, L.
(54) McRaild, R.
(55) Tucker, W.
(56) Rickerman, W.
(57) Smith, J.
(58) Kitchen, W.

(59) Harrington, R.
(60) Opala, E.
(61) Holden, R.
(62) McBride, J.
(63) Etter, C.
(64) Cohen, D.
(65) Savage, A.
(66) Miller, J. R.
(67) Nagy, R.
(68) Hruska, A.
(69) Davidson, J.
(70) D'Hondt, C.
(71) Lewis, D.
(72) Toole, W.
(73) Rood, M.
(74) Raridan, R.
(75) Skinner, C.
(76) Doherty, R.
(77) McCain, J.
(78) Czedik, E.
(79) Stephenson, A.
(80) Sass, R. O.
(81) Simkow, F.
(82) Cote, S.
(83) Spence, S.
(84) Tindle, M.
(85) Middleton, M.
(86) Bleau, J.
(87) Cullen, O.
(88) Brewer, Betty
(89) Brewer, Ben
(90) Beltramello, P.
(91) Raridan, J.
(92) Pennington, B.
(93) Skinner, T.
(94) Konczal, A.
(95) Wozniak, S.
(96) Morgans, J.
(97) Pace, B.
(98) Kanter, R. L.
(99) Walker, C.
(100) English, J.
(101) Clemente, G.
(102) Altman, H.
(103) Hagerty, M.
(104) Croll, D.
(105) Paquette, A.
(106) Bungard, L.
(107) Cifor, G.
(108) Collins, J.
(109) Hunter, E.
(110) Meharry, M.
(111) Jerome, E
(112) Pidgeon, T.
(113) Crowder, G.
(114) Pitts, E.
(115) Cote, A.
(116) Struble, L.
(117) Clavenna, A.
(118) Martin, W.
(119) Gates, R.
(120) Line, H.
(121) Wolfe, M.
(122) Reed, P.
(123) Kennedy, R.
(124) Komp, R.
(125) Goulett, R.
(126) Viers, T.
(127) Cook, G.
(128) Lawler, R.
(129) Wojnicz, S.
(130) Whitney, J.

(131) Steffen, N.
(132) Trudell, A.
(133) LaBallister, V.
(134) Calvert, C.
(135) Richards, B.
(136) Brown, W.
(137) Best, L.
(138) Dunbar, L.
(139) Spreitzer, C.
(140) Danielian, C.
(141) Crane, J.
(142) Greenhalge, M.
(143) Fleming, D.
(144) Lee, J.
(145) Rusnell, G.
(146) Edmonds, R.
(147) Strama, J.
(148) Lackey, V.
(149) Vandenstorm, E.
(150) Brandon, Judy
(151) Cohen, A.
(152) Walsh, E.
(153) Doney, G.
(154) Tootikian, P.
(155) Calandrino, F.
(156) Neil, C. A.
(157) Beltramello, R.
(158) Summers, J.
(159) Oursa, D.
(160) Clein, F.
(161) Robbins, A.
(162) Goulet, E.
(163) Walters, G.
(164) Brandon, J. E.
(165) Coe, T.
(166) Brunell, J.
(167) Berman, S.
(168) May, R.
(169) Shannon, V.
(170) Van Tuyl, C.
(171) Pekala, E.
(172) Harlan, R.
(173) Brooks, R.
(174) Thomson, R.
(175) Pollock, C.
(176) Wallace, W.
(177) Gammon, R.
(178) Gable, M.
(179) Grover, R.
(180) Kenske, W.
(181) Young, N.
(182) Jaeger, D.
(183) Barrett, L.
(184) Gable, J.
(185) Gray, J. L.
(186) Zauhar, M.
(187) Bray, H.
(188) McCoy, J.
(189) Tatum, R.
(190) Helmick, E.
(191) Wassmer, E.
(192) Szaniszlo, S.
(193) Sobczak, D.
(194) McGraw, J.
(195) Kennedy, J.
(196) Wilson, G.
(197) Collins, S.
(198) Ellard, J.
(199) Conrad, L.
(200) Harrison, G.
(201) Thompson, J.
(202) Foster, S.

(203) Curphey, D.
(204) O'Neil, J.
(205) Alan, D.
(206) Coller, M.
(207) Roach, D.

In addition to the above listed names, there will be an additional 12 guarantees extended that will be claimable as apprentices come out of their time. The guarantee will be claimed by the individual substitute holding the highest priority.

These names shall be enrolled in the Job Guarantee Roster and extended a job guarantee until attainment of his sixty-fifth (65) birthday, or such employee's death, whichever shall occur first.

This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:

(1) Strike or lockout.

(2) Disability of the guarantee holder.

(3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.

(4) Leave of absence of priority holder.

(5) Time off for Union business.

(6) Service in the armed forces.

This guarantee shall be terminated for the following causes:

(1) Resignation of the guarantee holder.

(2) Death of the guarantee holder.

(3) Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication.

Either party may raise for discussion the possible revision of these guarantees, where continuance of the guarantees will jeopardize the job opportunities for a majority of the situation holders. It is further understood that the revision of these guarantees shall not be a matter of arbitration.

Any employee on the Job Security List who refuses a composing room situation he is competent to fill, shall be removed from the Job Security list and the Publisher shall have no further obligation for such employee arising out of his having been on the Job Security list.

Once 40 of the Detroit Free Press regular situation holders as of 11-11-74 have surrendered their Free Press priority, for each vacancy which occurs within a period of nine months (270 days) of that 40th priority surrender, one substitute on the 11-11-74 priority list shall be advanced to regular priority status and extended a lifetime guarantee.

After the nine-month period has been exhausted, no further lifetime guarantee shall be extended.

3. THE END TO PAST AND FUTURE RE-SET OBLIGATIONS AND THE CONTRACTUAL SUBSTITUTION OF GUARANTEES AND BENEFITS

It is recognized that this contract differs from the agreement which expired June 17, 1974 between the parties in that it includes provisions for specific additional benefits and preservation of work opportunities for employees in lieu of previous contract provisions in Section 30 and elsewhere, which required the reproduction of certain advertisements received from sources outside of the composing room.

From the effective date of this agreement, Section 30 shall be declared null and void, the benefit and guarantee arrangements shall be substituted in its place, and the

Publisher shall be relieved of any accumulated re-set obligations and any future obligation to honor re-set practices or re-set contractual obligations.

It is understood and agreed that the Publisher has the right to use such material without subsequent reproduction of such work by employees covered by this agreement.

The Publisher agrees not to subcontract work normally performed in the composing room, but material coming in from advertisers that heretofore has been reproduced shall not be considered subcontracting. It is further recognized that the contract provision requiring all work within the jurisdiction of the Union to be performed only by journeymen and apprentices covered by this agreement is not applicable to the work referred to in this paragraph. The Publisher agrees that he will not encourage advertisers to supply material normally processed by employees covered by this agreement.

4. LUMP SUM PAYMENT WITHOUT PRIORITY SURRENDER

(a) The Publisher will provide, on January 1, 1975, all individual priority holders on the 11-11-74 Detroit Free Press priority list from Number 1 to, and including Number 303 (including apprentices) with lump sum payments in the amount of $20, per month of continuous Free Press priority between January 1, 1968 and January 1, 1975; however, for those priority holders covered by this subsection (4a) who have service at the Detroit Free Press previous to their priority date, yet after January 1, 1968, the lump sum formula in the amount specified in this subsection (4a) shall apply for each month of such service (each 22 days worked will constitute one month of service).

(b) After fifteen (15) regular priority holders have surrendered their priority, the publisher will provide all individual priority holders on the 11-11-74 Detroit Free

Press priority list from Number 1 to, and including Number 207, (together with apprentices holding priority on that list) who then remain on the priority list with lump sum payments in the amount of $20, per month of continuous Free Press priority between January 1, 1968 and January 1, 1975; however, for those priority holders covered by this subsection (4b) who have service at the Detroit Free Press previous to their priority date, yet after January 1, 1968, the lump sum formula in the amount specified in this subsection (4b) shall apply for each month of such service (each 22 days worked will constitute one month of service).

(c) After an additional twenty-five regular priority holders (15 through 40) have surrendered their priority, the Publisher will provide all individual priority holders on the 11-11-74 Detroit Free Press priority list from Number 1 to, and including, Number 207, (together with apprentices holding priority on that list) who then remain on the priority list, with lump sum payments in the amount of $10.71 per month of continuous Free Press priority between January 1, 1968 and January 1, 1975; however, for those priority holders covered by this subsection (4c) who have service at the Detroit Free Press previous to their priority date, yet after January 1, 1968, the lump sum formula in the amount specified in this subsection (4c) shall apply for each month of such service (each 22 days worked will constitute one month of service).

No advancements will be extended against these lump sum payments except for emergency causes submitted in writing and approved by the President of Local #13 and the Director of Operations of the Detroit Free Press.

5. MANDATORY RETIREMENT AND BENEFITS

(a) Effective March 1, 1975. mandatory retirement shall be established for covered employees, which will require

retirement on the first of the month following attainment of each employee's sixty-fifth (65th) birthday.

(b) The Publisher will provide those employees required to begin mandatory retirement on March 1, 1975 (and those employees only), with the following choice of alternate benefits:

(1) $300.00 per month for twenty (20) months to such retired employee or his/her designated beneficiary.

(2) $100.00 per month for sixty (60) months to such retired employee or her/his designated beneficiary.

(3) $5,000 lump sum proceeds.

6. EARLY RRETIREMENT SUPPLEMENTARY BENEFITS

(a) The Publisher will provide to those 12 most senior Applicants from those Detroit Free Press regular situation holders who are 60 years of age, or greater, prior to 7-1-75 or his/her designated beneficiary, who elect early retirement between 1-1-75 and 7-1-75 (unless otherwise extended by the Publisher) with payments in the amount of $300 per month until his sixty-fifth (65th) birthday, upon surrender of their Detroit Free Press priority rights.

(b) For those regular Detroit Free Press situation holders who are sixty-three (63) years of age and 6 months, or greater, (but not yet 65) on 3-1-75 or his/her designated beneficiary (and for these only) the Publisher will insure that such employees will receive $300 per month after his sixty-fifth (65th) birthday, for as many months after 65 as are necessary so as to allow seventeen (17) months before or after age sixty-five (65) in which $300 could have been obtained, whether obtained or not.

(c) Blue Cross/Blue Shield benefits shall be made available without cost to such employees electing early retirement,

until their 65th birthday, or commencement of Medicare benefits, or commencement of equivalent National Health Insurance benefits, whichever occurs first.

7. PRIORITY SURRENDER BONUS

Those first twenty-five (25) Detroit Free Press regular situation holders surrendering Detroit Free Press priority rights under arrangements not described in #5 and #6 above during the life of this Agreement (6-13-74–6-17-77) shall received lump sum payments in the amount of $3,600, less ½ of the value of any proceeds already received under #4 above.

8. VACATION ENTITLEMENT

With respect to the Detroit Free Press only, effective 1-1-75, Section 11(b) of the labor agreement shall be omitted and Section 11(a) and (c) shall be revised to read as follows:

Section 11(a): All employees as of December 31 of any year shall be entitled to vacation credits in the amount of one-eleventh (1/11th) of wages earned the preceding calendar year, such vacation in no case to exceed twenty (20) days.

Section 11(c): Vacation credits may be liquated only in the calendar year following the calendar year in which they are earned. Provided, in cases of withdrawal from the office prior to December 31 of any year, accrued vacation credits of that calendar year shall be paid to the employee at the time of termination of employment on the basis of one-eleventh (1/11th) of a day's pay credit for each day's pay earned during that year.

9. WORK OPPORTUNITIES

It is the intent of the Publisher under this proposal to provide meaningful job assignments to those in receipt of job guarantees. The Publisher reserves the right to bring commercial printing assignments into its composing room to satisfy guarantee obligations. Where possible, new equip-

ment not to date utilized in the composing room will be employed to provide further journeyman work opportunities.

The Publisher reserves the right to encourage voluntary transfer to positions outside the ITU unit where such opportunities are compatible with a guarantee holder's experience and ability without forfeiture of established guarantees.

10. NEW PROCESSES

In return for the lifetime guarantees and other benefits extended above, the Publisher will receive the following in return:

(1) The withdrawal by Local 18 of grievances and arbitration issues involving OCR and CRT equipment and processes currently before Arbitrator Crane.

(2) Effective with the signing of this Agreement and for 12 consecutive months thereafter, no additional substitutes other than the priority and non-priority substitutes on the roster of 12-23-74 listed below shall make themselves available for work in the Detroit Free Press composing room chapel.

PRIORITY SUBS

(1) Clinton, R.
(2) Marshall, J.
(3) Keener, R.
(4) Wood, C.
(5) Brunell, M.
(6) Moceri, L.
(7) Rusnell, B.
(8) O'Neal, D.
(9) Downey, M.
(10) Miller, H.
(11) Hamilton, A.
(12) Ambrose, M.
(13) Kleczkowski, J.
(14) Morris, R.
(15) Jarvis, M.
(16) Wilson, F.
(17) Donnelly, B.
(18) Kennedy, H.
(19) Pope, D.
(20) Campbell, D.
(21) Nudi, C.
(22) Edwards, R.

(23) Roberts, G.
(24) Discher, R.
(25) Shaffer, D.
(26) McCarthy, E.
(27) Miller, Roger
(28) King, L.
(29) McCarthy, R.
(30) Egbert, W.
(31) LeFaive, R.
(32) Martinez, J.
(33) Michels, D.
(34) Miles, P.
(35) Ash, R.
(36) Dulac, L.
(37) Ellington, T.
(38) DeBacker, D.
(39) Wildbaum, S.
(40) Barber, R.
(41) Pitts, J.
(42) Dean, F.
(43) Stottler, D.
(44) Petrous, E.
(45) Visscher, L.
(46) Schneider, M.
(47) Bates, D.
(48) Ulrich, A.
(49) Jerzewski, N.
(50) Rust, R.
(51) Tinsler, V.
(52) Sinclair, W.
(53) Greene, E.
(54) Lanczynski, P.
(55) Murzin, J.
(56) Maas, R.
(57) Grenfall, T.
(58) Dyda, M.
(59) Floer, D.
(60) Hoogstra, G.
(61) Browning, L.
(62) Sandoval, P.
(63) Pytel, A.
(64) Roberts, L.
(65) Karam, J.
(66) McCoy, Wm. R.
(67) Galvan, E.
(68) Bray, W.
(69) Butch, L.
(70) Mitchick, J.
(71) Jones, D.
(72) Manner, B.
(73) Navarro, B.
(74) Ash, C.
(75) Mendryga, E.
(76) Doyle, E.
(77) Rogers, T.
(78) Scott, W.
(79) Srock, G.
(80) Habarth, E.
(81) Gavulic, B.
(82) Miller, R. E.
(83) Hutchman, Jack
(84) Quinn, J. W.
(85) Stinson, E.
(86) Murphy, A.
(87) Moore, D.
(88) Serfass, H.
(89) Noble, D.
(90) Migrants, D.
(91) Dowell, W.
(92) Spears, E.

NON-FRIORITY SUBS

(1) Slumpff, R.
(2) Cobane, F.
(3) Wrosch, E.
(4) Hales, J.
(5) Brodersen, G.
(6) Weiner, J.
(7) Weiner, P.
(8) Allman, W.
(9) Dean, D.
(10) Stanko, F.
(11) Nigosian, I.
(12) Collins, A.
(13) Schoen, M.
(14) Mair, F.
(15) Beattie, J.
(16) Krakowiak, C.
(17) Sckula, J.
(18) Walker, R.
(19) Abrams, D.
(20) Kowalski, R.
(21) Amaimo, E.
(22) Barbish, R.
(23) Davis, A.
(24) Kaul, H.
(25) Binkley, H.
(26) Bunk, J.
(27) Goldenberg, D.
(28) Moss, N.
(29) Gordon, D.
(30) Winters, D.
(31) Giuadella, R.
(32) Mattson, G.
(33) Johnson, J.
(34) Cox, K.
(35) Young, A.
(36) Weber, C.
(37) Tinco, J.
(38) Kujawa, E.
(39) McCarthy, J.
(40) Fleming, J.
(41) Reid, D.
(42) Szkody, E.

APPRENTICE ROSTER—1-11-74

Morris, R.
Wojcik, A.
Pierce, R.
Haak, E.
Moble, D.
Elenich, K.
Kelly, B.
Barta, J.
Simon, R.
Markham, D.
Guene, S.
Kelly, V.

(3) The Union agrees to accept and process in the composing room material received in any form related to classified, advertising or editorial matter, irrespective of any restriction which may have been incorporated into the labor agreement prior to the ratification of this agreement.

(A) WORK ARRANGEMENT.

This section will describe the work arrangements of the ITU employee involving the use of scanners and VDT terminals when such equipment is performing composing room work within the jurisdiction of the Union.

(1) Operation of Video Display Terminals in the Composing Room.

(a) All keystroking to be used for typesetting of display ads.

(b) Use in making up display ads, page makeup, positioning of ads and type and all related steps for completion of page as per dummy layout.

(c) Updating the text of display ads, proofreading, and making corrections and alterations of display ads.

(d) The right to utilization of Video Display Terminals by persons outside the bargaining unit for purposes other than composing room work shall not be abridged.

(2) Classified Ads.

(a) All single column classified ads prepared scanner ready without borders, cuts (except standard sigs or attention getting devices stored on the disk), or illustrations, will be accepted and processed in the composing room. Multicolumn classified, including corrections and alternations, will be keyboarded and processed by composing room employees covered by this agreement.

(b) The Classified Dept. may utilize VDT terminals to recall single column classified ads, without borders, cuts or illustrations, from electronic storage in order to correct, add, delete, or kill copy, and also for the addition of necessary coding.

(3) Display Ads, including Classified Display, and Coding.

(a) All display advertising copy, including classified display, will be keyboarded and/or prepared by composing room employees. Any and all equipment, methods and procedures may be used for processing this matter by composing room employees.

(b) All coding for display ads, including classified display ads, will be done by composing room employees.

(c) Composing room employees will provide only the external cover coding (header sheet) when required for classified ads, general news, editorial copy and syndicated copy.

(4) News and Editorial, General.

(a) All copy produced on VDT terminals by the News and Editorial Department of the Publisher will be accepted and processed by composing room employees and all scanner ready copy produced or received by the News and Editorial department of the Publisher, including copy from the Publisher's own bureaus, will either be accepted and processed by composing room employees, or at the Publisher's discretion, may be entered directly into the electronic system for editing on VDT's Copy received by the Publisher which is not scanner ready or scanner acceptable and which requires minimal editing will be typed or perforated by composing room employees. No typing pool will be created or used to prepare such copy outside the composing room, however, copy which is now typed by employees not covered by this agreement may continue to be typed and made scanner ready before submission to the composing room.

(5) Wire Service and Syndicated Copy.

(a) All wire service and syndicated copy that is received by the News and Editorial Department of the Publisher scanner ready or as direct computer input will be accepted in original and edited form and processed by composing room employees.

(6) General.

The News and Editorial Department may utilize VDT terminals to recall OCR scanner prepared or direct imput material from electronic storage to make editorial changes.

(a) Nothing in this section shall be construed as preventing employees who are not covered by this Agreement from retrieving copy from computer storage for purposes of adding to, deleting from, modifying, updating, and/or rearranging the contents of such copy.

(b) When editorial changes are required to correct or update a story which has already been set in type and is ready for page makeup, these changes may be made electronically by editors, but any new pasteup will be done by composing room employees.

(B) PROOFREADING

All material keyboarded by the composing room shall be proofread, regardless of method used, by composing room employees. All other proofreading, when performed, shall be performed by composing room employees. The Publisher reserves the right to determine to what extent proofreading is performed for matter keyboarded by other than composing room personnel.

11. MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT, 6-18-74 TO 6-17-77

Any change necessary to make the labor agreement of 6-18-74 to 6-17-77 consistent with the work arrangements agreed to on OCR, VDT's and electronic storage and retrieval will be deemed made. This Memorandum of Agreement shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties.

DETROIT FREE PRESS

/s/ [ILLEGIBLE]

/s/ [ILLEGIBLE]

DETROIT TYPOGRAPHICAL UNION #13

/s/ [ILLEGIBLE]

[ILLEGIBLE]

APPENDIX L

AMERICAN ARBITRATION ASSOCIATION

Case No. 54 300 00797 98

Gr: Gary Russell

In the Matter of the Arbitration Between

DETROIT TYPOGRAPHICAL UNION NO. 18

and

THE DETROIT NEWSPAPER AGENCY

OPINION AND AWARD

Hearings in the above-captioned matter were held before the undersigned Arbitrator, Robert A. McCormick, on May 18 and June 17, 1999, in Southfield, Michigan. At the hearings, the Parties introduced testimony and documentary evidence in support of their respective positions. Thereafter, the Parties, through Counsel, submitted written briefs to the Arbitrator. This Opinion and Award is based upon careful consideration of this evidence and argument.

APPEARANCES:

SAMUEL C. MCKNIGHT, ESQ.	Attorney, Detroit Typographical Union No. 18
GREGORY V. MURRAY, ESQ. ROBERT M. VERCRUYSSE, ESQ.	Attorneys, The Detroit Newspaper Agency

WITNESSES:

S. Attard	Employer
J. Taylor	Employer

M. Bailey	Employer
J. Noetzel	Employer
D. Mills	Union
G. Rusnell	Union
S. McKnight	Union

ISSUES:

1. Is the underlying grievance arbitrable? If so,
2. Was the Grievant, Gary Rusnell, discharged for cause?

INTRODUCTION:

The controversy in this case arises out of a strike involving the Detroit Newspaper Agency (herein "the DNA" or "the Employer") and the Detroit Typographical Union #18 (herein, "the Union") which commenced on July 13, 1995. In connection with that work stoppage, a demonstration took place at the offices of the DNA located at 615 Lafayette Street in Detroit, Michigan on August 30, 1996.

The Grievant in this matter, Gary Rusnell, was employed by the DNA and its predecessor, The Detroit Free Press, for twenty-six years until November 18, 1996 when he was discharged for his activities in connection with the demonstration on August 30, 1996.

The DNA takes the position that Mr. Rusnell's grievance challenging his discharge is not arbitrable because the so-called Lifetime Job Guarantee Agreement (herein, "Agreement") and its just cause provision was not in force during the duration of the work stoppage or at the time of Mr. Rusnell's termination. Even if the just cause provision was in force, the DNA argues, Mr. Rusnell's activities on August 30, 1996 constituted ample cause for his termination.

The Union, on the other hand, argues that the DNA waived its right to argue that the just cause provision ceased to govern this dispute and that Mr. Rusnell's actions on August 30, 1996 fell substantially short of the just cause standard.

FACTS:

The facts of this case were presented through the testimony of seven witnesses. Sam Attard, DTU President, testified that he was present during the demonstration on August 30, 1996. When he arrived at approximately 10:00 a.m., he said, there were approximately two hundred strikers and strike supporters present. Later, he said, some three to four hundred people assembled. Speeches by national and local labor and political figures began at approximately 10:30 a.m.

Mr. Attard described the front of the DNA building where the demonstrators assembled. The Lafayette Street doors to the building, he said, constitute the only customer entrance and operate electronically by use of an electric eye. On each side of those doors are ramps running parallel to the building. In addition, there are steps leading directly to the main doors to the building. Mr. Attard recalled that the speakers on August 30, 1996 stood on a step in front of the main door.

Mr. Attard also identified an NLRB order entered in July, 1996[1]. According to Mr. Attard, that order instructed the Union to cease and desist blocking or otherwise coercively interfering with ingress or egress at the Employer's places of business by any means including, but not limited to, physical confrontation or intimidation. Unlawful group trespass, mass picketing, stationary picketing or placement of barriers or star nails or other sharp objects, he said, were also prohibited. Mr. Attard testified he was aware of the existence of this order prior to the August 30, 1996 demonstration and that the order

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[1] Joint exhibit 17.

had been enforced by the Sixth Circuit Court of Appeals[2]. He also said that the information contained in the order had been conveyed to the membership of the Union.

Mr. Attard testified that John Sweeney and Richard Trumka, President and Vice President respectively of the AFL-CIO, gave presentations at the demonstration on August 30, 1996. In one of the photographs taken that day[3], Mr. Attard identified Mr. Rusnell holding a picket sign.

He remembered officers of the Detroit Police Department being present at the demonstration and announcing that the demonstrators were blocking ingress and egress to and from the building. The officers told the demonstrators on three separate occasions to disperse. To this, Mr. Attard recalled, he responded that the demonstrators were not blocking access to the building and that the doors to the building had been locked before the speeches had begun. Mr. Attard testified that the demonstrators did not block the ramps or the steps and that the electronic doors to the building were not operating. Indeed, he recalled, when a police officer approached the building, the doors failed to open. By the time the doors were disabled, Mr. Attard said, there were some two hundred to three hundred people in the area, but none of them blocked the entrance to the building.

Mr. Attard stated that he positioned himself on the sidewalk in front of the doorway and instructed marshals to station themselves at the end of each ramp to ensure those ramps were kept open. He remained on the sidewalk, he said, to make sure no one blocked the doorway until after the police officer approached the building and found the doors disabled. At that point, Mr. Attard said, the power had been

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[2] Joint exhibit 18.

[3] Joint exhibit 20.

cut off and, consequently, there was no access to the building. He described this demonstration as a photo opportunity for the Union.

John Taylor, Senior Legal Counsel and Director of Labor Relations for the DNA, testified that the strike began in July, 1995 and that the striking employees made an unconditional offer to return to work in February, 1997. During the course of the strike, Mr. Taylor recalled, he observed the blocking of access to and from DNA facilities and personally experienced racial epithets from strikers. He also observed, he said, the throwing of star nails and was, himself, the victim of a physical assault. He recalled witnessing mass picketing as well as the aforementioned demonstration activities at 615 West Lafayette.

Mr. Taylor also described one incident which occurred before August 30, 1996 in which a group of approximately twenty individuals entered the lobby of the 615 Lafayette building and sat down, refusing to leave. On two or three other occasions, he recalled, a foul-smelling substance was thrown into the lobby.

On August 30, 1996, Mr. Taylor recalled, he was in his office at 615 Lafayette when, at approximately 11:00 a.m., he went to the lobby to observe the activities of the demonstrators. He estimated there were approximately three hundred fifty participants congregating in front of the main doors, along the two ramps, on the front step of the stoop, along sidewalks on either side of the door and into and across the street.

Mr. Taylor recalled seeing Mr. Attard standing in various locations in front of the building. Mostly, Mr. Taylor said, Mr. Attard sat in front of the electric doors, occasionally with his back against the door. At times, Mr. Taylor said, the ramps to the building were blocked by demonstrators as well. Like Mr. Attard, Mr. Taylor testified that the front entrance is

the only customer entrance to the 615 Lafayette building. The Third Street door, he said, is reserved for executives and others who park in the garage. There is a guard station inside that entrance, he said, and customers do not gain access to the building through that door.

On August 30, 1996, Mr. Taylor said, a customer could not have entered the front door because the crowd was gathered in such large numbers and was so condensed that it would be impossible to approach the front doors. From time to time, he said, both ramps were blocked. Mr. Taylor identified videotapes of the August 30, 1996 events.[4] He acknowledged that the video tape revealed that at 10:13 a.m., there was a two-by-four bracing the front door to 615 Lafayette preventing that door from being opened.

Mr. Taylor stated that he recommended the dismissal of Mr. Rusnell as well as all other demonstrators he could identify who were engaged in the actual blocking of access to the building. By this, he said, he sought to discharge the people sitting down in front of the door either on the ground or adjacent to the front steps leading up to the facility. He did not, he said, recommend the discharge of anyone who was standing, moving, picketing or engaging in protected concerted activity during the demonstration. Instead, he said, only those persons who engaged in the actual blocking of ingress and egress to the building who he believed were in violation of the Sixth Circuit's order were terminated.

Mr. Taylor testified that he drafted the letter discharging Mr. Rusnell[5] and that Mr. Kelleher signed it. That letter said,

> You are being discharged from the Detroit Newspaper Agency because of your conduct on August 30, 1996.

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[4] Joint exhibits 26 and 27.

[5] Joint exhibit 4.

> On that date you blocked the ingress and egress to the front entrance of The Detroit News Building. Your conduct is even more egregious in that it violates a formal National Labor Relations Board Settlement Agreement prohibiting such behavior
>
> This type of behavior will not be tolerated and is just and sufficient cause for your discharge.[6]

Mr. Taylor stated that fifteen to twenty employees were terminated based upon their actions at the August 30, 1996 demonstration.

Mr. Taylor conceded that although he concluded that the discharged employees were not engaged in protected concerted activity and that they had violated the Board's decision as well as the Sixth Circuit's consent judgment, the NLRB has nevertheless issued a complaint against the DNA and the Detroit News and Detroit Free Press alleging that the striking employees were engaged in protected activity and that their discharge violated the National Labor Relations Act. At the same time, he said, the NLRB has not taken a position on whether or not the Union violated the order by the activities of August 30, 1996.

Mr. Taylor testified that he did not know if anyone was sitting in front of the door to the building when the two-by-four was placed there. He also stated that all charges against the arrested individuals were dismissed. Mr. Taylor acknowledged that Mr. Rusnell appeared to be sitting on public property on the morning of August 30, 1996 and that he did not know how long Mr. Rusnell was seated there. At the same time, Mr. Taylor said, it did not matter where Mr. Rusnell was sitting because so long as he was part of a group that was collectively blocking the entrance, he, too, was blocking the entrance.

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[6] *Id.*

Mary Ann Bailey, an employee of Asset Protection Team testified that she is assigned to the 615 West Lafayette building. Ms. Bailey stated that she relieved another officer at approximately 10:30 a.m. on August 30, 1996 and that she remained at her duty station in the lobby for approximately one hour. During that period, she said, she saw approximately two hundred picketers, some of whom had their backs against the door. As a result of this, she said, people were unable to walk up and down the ramps leading to the front door. The Detroit Newspapers were open for business that day, she said, and normally it would have been be a very busy day because people would enter the building to place classified ads. At some time before she assumed her post at 10:30 a.m. on August 30, she said, the doors to the building were turned off and two-by-fours were placed in front of the doors. Ms. Bailey acknowledged that she had not stated in an earlier affidavit that the doors had been blocked or that persons could not walk up the steps to the building.

Lt. James Noetzel, a long-time veteran of the Detroit Police Department, testified as to the Department's standard response when it learned of a Union demonstration at the DNA. Once apprized that demonstrators would assemble at the Lafayette side of the building, he said, the Department would routinely notify the DNA that it would be advisable for them to lock their doors so demonstrators could not enter the building. The DNA usually did so.

Lt. Noetzel testified that he had no specific recollection of the events of August 30, 1996 and that he had been present at between fifty and seventy demonstrations. After reviewing his testimony given before the NLRB on April 14, 1998[7], however, Lt. Noetzell stated that he was present at the demonstration in front of the Detroit News on August 30, 1996. He could not, however, remember specific events of

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[7] Employer exhibit 5.

that day and, thus, did not know what time the doors to the building had been locked.

Lt. Noetzel described the standard procedure of the First Precinct and the Tactical Units before arrests were made. Command Officers would notify people that were going to be arrested, he said, and that they should move or cease blocking the entrance. This command, he said was normally repeated twice so everyone could clearly hear it. At that point, he said, Tactical Services Section officers would make arrests and escort prisoners to the busses.

David Lee Mills, an employee of the DNA since 1986 testified that at the time of the strike he was employed in the Circulation Department and assigned to vacation relief and street sales. He is represented by the Teamsters, Local 372. Mr. Mills testified that he attended the August 30, 1996 demonstration and that he had picketed a dozen or more times at that location between July 13, 1995 and August 30, 1996. While picketing on those occasions, he recalled, he observed the paths used by individuals entering the front doors. Most people would approach the entrance from the direction of Second or Third Avenues and walk up the ramps to the front door. Whether approaching from Second or Third, he said, the ramps are arrived at before the stairs so it is natural to enter the building by way of the ramps.

At the August 30, 1996 demonstration, Mr. Mills said, he was assigned to keep the Third Street ramp open. Consequently, he said, he positioned himself at the foot of that ramp. If people began crowding in, he said, he asked them to step back to keep the ramp open. A dozen or more police, he said, were stationed at the DNA building that day. A couple of them, he said, were near the steps on the sidewalk, others were in the crowd and one or two were placed at each of the ramps. Mr. Mills testified that he observed three people attempt to enter the building via the Third Street ramp and that the ramp was open. According to

Mr. Mills, however, a police officer told those persons they could not enter the building that way and that they should go around to the Third Street entrance because the doors had been locked. Mr. Mills conceded that he did not testify at the Board proceeding that he had been assigned to keep the ramps open.

Mr. Mills said that he sat in front of the entrance for approximately fifteen or twenty minutes and that he was requested by the police to move two or three times. He refused, he said, to do so. According to Mr. Mills, the ramps to the building were open and never blocked and people could have freely gained access to the building.

Gary Rusnell, a Journeyman Printer, was employed by the DNA and, before that, the Detroit Free Press for twenty-six years before his discharge. Mr. Rusnell testified that he arrived at the August 30, 1996 rally at approximately 10:00 a.m. and that he joined in picketing the DNA building. The picketing, he said, continued for approximately one hour after his arrival. When he first arrived, he recalled, he observed the front doors on Lafayette Street opening and closing electronically. At approximately 10:30 a.m., however, he saw people approach the doors and observed that the doors would no longer open.

Mr. Rusnell testified that speeches were delivered by AFL-CIO President John Sweeney, Vice-President Richard Trumka and Secretary-Treasurer Linda Chavez that day as well as by officers of other labor organizations including the CWA, UAW, and USA. Public figures including Bishop Gumbleton, City Council President Maryanne Mahaffey and Congressman John Conyers also spoke. During these speeches, which lasted approximately one hour, he said, he was "milling around" on the street. The ramps leading to the front doors of the building, were open during this time and

police were posted on the ramps and on the sidewalk amongst the crowd. Union members, too, he said were present acting as marshals.

After the speeches had concluded, Mr. Rusnell said, a number of the demonstrators and speakers sat down on the stoop as well as the steps to the building. In addition, he said, a number of picketers sat down on sidewalk. He, too, sat down on the sidewalk just below the railing of the ramp leading toward Second Street where he remained for approximately twenty minutes. He was not in front of the steps or on either of the ramps leading to the doors. He did this, he said, for the photo opportunity and in support of the striking employees. It was not his intention, he said, to block ingress or egress to the building.

Before leaving the area, he said, police officers approached the persons who were seated and asked them to move so an aisle could be created. In response, he said, he moved immediately towards Second Street. The police then approached the steps and led Mr. Sweeney and others who occupied the top of the steps away. Mr. Rusnell was not arrested.

Mr. Rusnell testified that during his twenty-six years of employment, he was never disciplined in any way. Indeed, he said, he received a model employee award called the Spirit of the Free Press Award in 1988. He identified a photograph[8] of the demonstrators which showed, among other things, that he was seated in front of the stoop and to the left of it. Approximately fifty other people were also there.

Samuel McKnight testified that in his capacity as Counsel to the Union he has received no pleadings from the NLRB petitioning to have any of the Unions held in contempt of the Board's order.

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[8] Joint exhibit 25.

Other facts that bear upon the resolution of this case appear later in this Opinion and Award.

DISCUSSION:

There are two issues in this case, the first of which is whether the underlying question surrounding Mr. Rusnell's discharge is arbitrable.

Arbitrability

The DNA argues that the Arbitrator is without the authority to determine the lawfulness of Mr. Rusnell's discharge because the just cause provision in the Lifetime Job Guarantee Agreement was suspended at the time of his discharge. A brief review of the history of that Agreement is in order.

In 1974, the Parties entered into agreements entitled Lifetime Job Guarantee Agreements with the DNA's predecessors, The Detroit News and The Detroit Free Press[9] and these Agreements were adopted by the DNA in 1989.[10] The Agreement contains a "lifetime guarantee" clause under which certain employees, including Mr. Rusnell, "shall be . . . extended a job guarantee until attainment of his sixty-fifth (65) birthday, or such employee's death, whichever shall occur first.[11] The guarantee, however, is not without limitation because it also states

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) Strike or lockout

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[9] Joint exhibit 2.

[10] Joint exhibit 3.

[11] Joint exhibit 2, Section 2.

(2) Disability of the guarantee holder

(3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.

(4) Leave of absence of priority holder

(5) Time off for Union business.

(6) Service in the armed forces.

This guarantee shall be terminated for the following causes:

(1) Resignation of the guarantee holder.

(2) Death of the guarantee holder.

(3) Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.

(4) attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication.

The DNA argues that, by the above language, the lifetime job guarantee was suspended during the duration of the strike and that, consequently, the Union forfeited just cause employment for its job guarantee holders for the duration of that job action. As a result, they argue, there is no contractual basis upon which to base the claim.

Despite the surface appeal of the DNA's argument regarding arbitrability, it fails for the following reasons. First,

at the hearing in this matter, Counsel specifically discussed the scope of the proceeding and the issue as follows:

> Mr. McKnight: Well, I just want to know their position. The only issue here, as far as you are concerned, is just cause for discharge?
>
> Mr. Murray: That's correct.[12]

In this statement, the DNA plainly took the position that the only issue before the Arbitrator was whether there was just cause for discharge. In addition, the DNA proceeded as if the only question in this controversy was whether Mr. Rusnell's discharge was supported by just cause. For example, on February 27, 1997 Mr. Kelleher wrote to Mr. Attard as follows:

> You are reminded that certain individuals have job guarantees which were only suspended for the duration of the strike. Your claim that there is a lockout is frivolous. Those individuals are entitled to return to work promptly.[13]

Finally, in his November 26, 1996 letter to Mr. Rusnell discharging him, Mr. Kelleher wrote

> You are being discharged from the Detroit Newspaper Agency because of your conduct on August 30, 1996.
>
> On that date you blocked the ingress and egress to the front entrance of The Detroit News Building. Your conduct is even more egregious in that it violates a formal National Labor Relations Board Settlement Agreement prohibiting such behavior.
>
> **This type of behavior will not be tolerated and is just and sufficient cause for your discharge.**[14]

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[12] Transcript Vol. I at 17.

[13] Joint exhibit 10.

[14] Joint exhibit 4 (emphasis added).

These writings and assertions persuade the Arbitrator that the DNA considered itself bound by the just cause provision of the lifetime job guarantee agreement when it discharged Mr. Rusnell.

In addition, the conclusion that the just cause provision applies in this case is supported by the Agreement itself. After recognizing the right to lifetime employment, the Agreement describes six circumstances under which it would be "interrupted". Each of these circumstances are ones in which the employee would be temporarily away from work for voluntary reasons or reasons beyond his or her control. In contrast, the guarantee could be "terminated" for five different reasons including the "just cause separation of the guarantee holder."

These provisions, read together, suggest that the Parties envisioned that the designated employees would be entitled to continued employment unless such work was "interrupted" for the listed reasons, but that the guarantees would only be "terminated" or lost because of resignation, death, just cause termination, retirement or permanent suspension. As the Union points out, unless the job guarantee survived a strike or lockout, the DNA could avoid its strictures by locking out job guarantee holders and terminating their rights under the Agreement, thereby making the guarantee essentially meaningless. This very argument was addressed by Arbitrator Barry Brown in a matter interpreting this Agreement between the DNA and a different Union.[15] In his opinion, Arbitrator Brown wrote:

> Judge Cook addressed this argument in his order. He noted that the DNA had asserted that arbitration was unavailable to the parties, because the job guarantees were interrupted during the period of the strike. He ruled

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[15] Detroit Newspaper Union, Graphic Communications Int'l Union, Local 13-N—and—Detroit Newspaper Agency

> that the DNA could raise this issue in arbitration, but he held that it had waived the defense that the union members were not covered by the CBA when it failed to raise in opposition to the union's motion to compel arbitration. The employer cites that sentence in Section 32 (4) (C) which *temporarily* suspends the job guarantees for the period of a strike. However, another provision allows a *termination* of these rights only for four (sic) specific reasons, one being discharged (sic) for cause. Furthermore, the guarantee commitment is to endure beyond the term of any specific collective bargaining agreement. The employer's suggested interpretation would render this provision meaningless. The more reasonable meaning of this language is that an employee on strike has no right to claim five days of work during the term of the work stoppage, but his lifetime guarantee continues, and the temporary suspension of his lifetime guarantee is reinstated when the strike is ended. At this point, the employee with the lifetime guarantee can seek reinstatement, and the employer has the burden of proof to show why that employee's guarantee has been terminated.[16]

These facts and observations persuade the Arbitrator that the just cause provision of the Lifetime Job Guarantee Agreement applied to Mr. Rusnell at the time of his discharge and that, consequently, the grievance is arbitrable.

Just Cause

The underlying issue in this case is whether Mr. Rusnell was discharged for just cause. In its letter discharging Mr. Rusnell, the DNA stated that he was terminated for having "blocked ingress and egress to the front entrance of the

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[16] *Id.* At 13-14. *See also*, Local 13-N Graphic Communications International Union (GCIU) -and- Detroit Newspaper Agency (DNA). [Gr: Eugene Tebo, Jr.] Lyons, Arb.

Detroit News Building."[17] The letter also stated, "Your conduct is even more egregious in that it violates a formal National Labor Relations Board settlement agreement prohibiting such behavior"[18].

The facts reveal that on August 30.11996, Mr. Rusnell sat on the sidewalk adjacent to the steps leading to the Detroit News building. Mr. Rusnell plainly did not, by himself, hinder any person's, or any potential person's, ingress or egress to or from the building. Indeed, if there was any question regarding that fact, the evidence demonstrates that Mr. Rusnell promptly moved to one side when Detroit Police officers directed him to and he was not among those arrested that day. While there were others who sat on the steps in front of the doors and still others who stood along the ramps leading to the building, Mr. Rusnell, himself, did nothing whatsoever to impede the movement of persons to or from the building nor did he even encounter a person who sought to enter or leave the building.

In the opinion of the Arbitrator, the just cause concept endows the individual employee with the guarantee of continued employment unless the employer can demonstrate that that employee's conduct warrants separation. Such is not the case here. And whether or not he breached the orders of the NLRB or the Sixth Circuit Court of Appeals is beyond the scope of the Arbitrator's authority which grows out of, and is limited to, the contract between the Parties. Whether or not those orders were breached must be left to the NLRB and the Court of Appeals to determine.

In the judgment of the Arbitrator, Mr. Rusnell's actions on August 30, 1996 fell far short of any behavior that would provide cause for termination. In essence, he attended a demonstration with other striking employees and

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[17] *Joint exhibit 4.*

[18] *Id.*

sympathizers, including important public figures, organized for the purpose of bringing publicity to their dispute. He picketed, listened to speeches and then sat down on the sidewalk for approximately twenty minutes, promptly moving when directed to do so by police authorities, before leaving the area. These actions do not constitute cause for his termination or any other discipline, particularly given the fact that he is a twenty-six year employee with a wholly unblemished disciplinary work record.

For these reasons, the discharge must be set aside and Mr. Rusnell made whole for his loss of pay and other benefits lost as a result of this discipline.

AWARD:

For the foregoing reasons, the grievance is granted. The DNA shall reinstate Mr. Rusnell to his previous position and shall make him whole for pay and other benefits lost during the period of this discipline.

/s/ Robert A. McCormick
ROBERT A. MCCORMICK
Arbitrator

December 16, 1999
East Lansing, Michigan

Supreme Court, U.S.
FILED
JUL 17 2002
CLERK

No. 01-1830

IN THE

Supreme Court of the United States

DETROIT NEWSPAPER AGENCY,
Petitioner,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Introduction

This case involves the arbitrability of a dispute regarding a vested benefit—a lifetime job guarantee—after the expiration of a collective bargaining agreement. There is nothing extraordinary about the Sixth Circuit's application of Supreme Court and Circuit Court precedent to the facts of this case. The Sixth Circuit, following the Supreme Court's teachings in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), concluded that post-contract disputes regarding lifetime vested job guarantees are arbitrable. The Sixth Circuit's ruling followed prior rulings of the Fourth

Circuit Court of Appeals and the Seventh Circuit Court of Appeals in similar cases. The only thing extraordinary about this case is the Detroit Newspaper Agency's determination to go to any length to defeat labor arbitration.

B. The Decisions Of The District Court And The Sixth Circuit Are Correct.

In 1974, DTU 18 and the predecessors to the Detroit Newspaper Agency (DNA) entered into identical Memoranda of Agreement (MOA) which provided that named individuals had lifetime job guarantees. Gary Rusnell is one of the named job guarantee holders. The MOA states:

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) Strike or lockout.
>
> (2) Disability of the guarantee holder.
>
> (3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.
>
> (4) Leave of absence of the priority holder.
>
> (5) Time off for Union business.
>
> (6) Service in the armed forces.
>
> This guarantee shall be terminated for the following causes:
>
> (1) Resignation of the guarantee holder.
>
> (2) Death of the guarantee holder.
>
> (3) Just cause separation of the guarantee holder, unless restored to his position through the appeal provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication. (App. 138a-139a)

The MOA also includes a section titled "MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT" which provides that the provision of the MOA "shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties." (App. 150a)

On April 30, 1995, the 1992-1995 Collective Bargaining Agreement (CBA) between DTU 18 and the DNA expired. On July 13, 1995, DTU 18 and five other unions struck the DNA. In mid-February of 1997, DTU 18 and the other unions unconditionally offered to return to work. The DNA immediately reinstated most DTU 18 members who had lifetime job guarantees; but the DNA refused to reinstate some job guarantee holders, including Rusnell, because they had been "discharged" for "just cause" during the strike. (APX 222) DTU 18 filed a grievance on behalf of the terminated job guarantee holders. The DNA refused to arbitrate the grievance because, "[a]s these discharges occurred after the contract expired, arbitration would not appear to be available." (APX 116) DTU 18 sued to compel arbitration.[1]

The DNA's petition states that the district court refused to rule on the issue of arbitrability and "ordered the parties to

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[1] The DNA's statement, without record authority, that the other DTU 18 members who were "discharged strikers [with job guarantees] decided to retire in lieu of pursuing their respective grievances," is misleading. (Petition, p. 8, n. 7) In fact, the other DTU 18 strikers with job guarantees who were terminated for alleged strike misconduct received substantial "job guarantee buyout payments and severance benefits" in resolution of their grievances.

submit the issue of whether the grievances were arbitrable to the arbitrator." (Petition, p. 6) That is not true. The district court held that it was not necessary to rule on the DNA's interpretation of the "interruption" language of the job guarantee agreement in order to decide substantive arbitrability. Since the job guarantees were vested and a part of an "ongoing" MOA, disputes regarding the termination of job guarantees were arbitrable under the expired CBA. Arbitration, not the court, was the proper "forum" to consider evidence about the interpretation of the MOA provisions that the job guarantees are "interrupted for the duration of a strike or lockout," "restored at its conclusion" and may be "terminated" for "just cause separation of the guarantee holder unless restored to his position through the appeal provision of the labor contract." (App. 27a-28a) [2]

The Sixth Circuit noted that the district court expressly *had* decided the issue of substantive arbitrability, and the Sixth Circuit summarized applicable Supreme Court and Circuit Court precedent.

> The DNA contends that the district court erred by "refus[ing] to resolve . . . whether there was a right to

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[2] The DNA's description of the outcome of a consolidated lawsuit involving job guaranteeholders in one of the other striking unions, GCIU Local 13N, is misleading. The DNA states that, "The DNA and GCIU resolved Case No. 97-CV-74553 during the course of litigation before the district court. GCIU was a party to the district court's March 3, 1998 order, but not its later February 8, 1999 order concerning arbitrability." (Petition, p. 6, n. 4) In fact, following the district court's March 3, 1998 order compelling arbitration, the DNA and GCIU arbitrated two cases involving the discharge of job guarantee holders for alleged misconduct during the strike. The arbitration decisions in both cases were part of the record in the Rusnell case before Arbitrator McCormick. As Arbitrator McCormick noted, in both GCIU cases, the arbitrator rejected the DNA's argument that the grievant's job guarantee was not protected by just cause because the grievant was discharged during a strike when the job guarantee was interrupted. (App. 165a-166a)

arbitrate the propriety of discharges that occurred during the strike." No. 00-1613 Br. 24. Actually, the district court explicitly determined that the dispute was "covered" by the arbitration agreement and thus compelled arbitration. No. 00-1613 App. at 510. The district court thus fulfilled its obligations under *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 651 (1986) ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances. . . .").

Federal labor policy strongly favors arbitration, and "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers*, 753 F.2d 40, 43 (6th Cir. 1985) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). The district court compelled arbitration because it could not say "with positive assurance" that the dispute was not subject to arbitration. This finding, as the district court noted, would not be inconsistent with an arbitrator subsequently deciding that under the "merits and the specific facts of the particular grievance, it is not subject to arbitration." (App. 10a)

* * *

As the Fourth Circuit has pointed out, arbitration makes particular sense in the context of lifetime employment guarantees. As that court explained:

> [L]ifetime job guarantees . . . owe their existence to the recognition, both by the relevant unions and the employers in the printing industry, that technological advances in that industry are gradually bringing about

> the demise of the bargaining unit and its bargaining power. Knowing that they would eventually lose the economic ability to enforce contract demands, the unions in negotiating these provisions traded opposition to management's availing itself of new technology for a guarantee of job security with an implicit covenant of good faith to provide an hourly wage that will be reasonable under all pertinent circumstances.

Cumberland Typographical Union No. 244 v. The Times Alleganian Co., 943 F.2d 401, 406-407 (4th Cir. 1991) (citation omitted) (App. 11a-12a)

* * *

In *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), the Supreme Court ruled that the right to arbitrate vested benefits survives the expiration of particular collective bargaining agreements: "[I]f a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions." *Id.* at 207-208. Section 11 of the MOA between the Union and DNA clearly provides that the MOA's provisions would remain "ongoing" even after the expiration of a particular collective bargaining agreement. The guarantees become part of future CBAs. Moreover, the 1992-1995 CBA stated explicitly in its incorporation of the guarantee that the guarantee would survive the expiration of the agreement. The Lifetime Guarantee MOA itself specifies that challenges to whether a separation was based on "just cause" would be resolved "through the appeals provision of the labor contract," which, in the case of the 1992-1995 CBA, was arbitration. Clearly, under *Litton*, the guarantee is a

benefit which continues after the agreement's expiration. "[I]f a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period." *Litton*, 501 U.S. at 205.

In the case over wage cuts in the face of a virtually identical lifetime job guarantee (with the same succession clause), the Fourth Circuit compelled arbitration even after the expiration of the agreement. *See Cumberland Typographical*, 943 F.2d 401 (4th Cir. 1991). The court held that the lifetime guarantee "continue[d] after the expiration of the main collective bargaining agreement," *Id.* at 405, and thus provided a basis for ordering arbitration. The Seventh Circuit has reached a similar conclusion. *See Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510 (7th Cir. 1988). The DNA's efforts to distinguish the decisions from other circuits relied upon by the Union are unpersuasive. The DNA asserts that the right to a lifetime guarantee never existed for striking workers, and therefore that the right never "vested" so as to survive expiration. Since we hold that the lifetime guarantee could not be unilaterally terminated during a strike, we reject this argument. The right had fully vested, and therefore the dispute concerned interpretation of the 1992-1995 CBA in which the MOA was incorporated and thus should be resolved according to the arbitration provision of that agreement. (App. 12a-13a)

The DNA also mischaracterizes the decision of the Sixth Circuit when it argues that the Sixth Circuit substituted "its own misguided notions of what is 'fair'" for the job guarantee language of the MOA. (Petition, p. 21) That is not true. The Sixth Circuit did not weigh equities or hardships. The Sixth Circuit applied ordinary principles of contract interpretation

to conclude that Arbitrator McCormick's interpretation of the job guarantee agreement was "the only *fair reading* of the guarantee."

> [W]e think that the Union's interpretation of the agreement is not simply one to which the agreement is susceptible, but is actually the only *fair reading* of the guarantee. As the arbitrator pointed out, the guarantee includes a list of circumstances in which the guarantees are "interrupted" and a list in which they are "terminated." If an interruption permits the company to terminate guarantees without just cause, then the "termination" list is in some sense redundant. Since ordinary principles of contract interpretation call for interpreting an agreement so as to give meaning to every stated provision, interruption cannot provide the basis for termination. We think the parties intended "interruption" merely to provide a respite for the employer from paying wages and providing benefits to guarantee holders during one of the circumstances listed, in which the guarantee holder would be unable to contribute to the workplace in any real sense. The DNA has provided no authority for the proposition that the interruption of a guarantee permits an employer to terminate a guarantee holder without just cause or one of the other listed grounds for termination. Were we to accept the DNA's argument, it would mean that the employer could terminate the MOA as to employees on disability leave, in the armed services, absent on union business, or during periods in which newspaper production was suspended because of an Act of God. The unreasonableness of that conclusion is apparent. (Emphasis added.) (App. 10a-11a)

The above-quoted passages from the Sixth Circuit's opinion squarely rebut the arguments advanced by the DNA in support of its petition.

REASONS FOR DENYING THE WRIT

The DNA's argument that the Sixth Circuit's decision conflicts with the Supreme Court's decision in *Litton* is wrong. In *Litton*, the Supreme Court ruled that the right to arbitrate disputes regarding vested benefits survives the expiration of particular collective bargaining agreements. That is why the Sixth Circuit *followed Litton* when it affirmed the district court's ruling that the dispute regarding the "just cause" termination of Rusnell and several other individuals' with vested job guarantees was arbitrable under the expired CBA.

The DNA's argument that the Sixth Circuit's decision conflicts with a decision of the Seventh Circuit on the same issue also is wrong. The DNA points to *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993) in order to manufacture a non-existent split between Circuits. However, there is no conflict between the Seventh Circuit's decision in *Hyster* and the Sixth Circuit's decision in this case. In *Hyster*, the Seventh Circuit found that the district court erred when it ruled that arbitration (not the court) was the proper forum to decide substantive arbitrability that *necessarily* involved deciding the merits. *Id.* at 236. In this case, the Sixth Circuit affirmed the district court ruling that it was *not necessary* to reach the merits of the DNA's discharge arguments in order to find that the dispute regarding vested job guarantees were arbitrable under the expired CBA. Indeed, the Sixth Circuit's holding in this case is the same as the Seventh Circuit's holding in a similar case involving a lifetime job guarantee agreement. *See Chicago Typograph-ical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510 (7th Cir. 1988).

CONCLUSION

For the foregoing reasons, Respondent DTU 18 requests that the DNA's petition be denied.

Respectfully submitted,

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